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ABSTRACT

This manual was written in order to help community workers become more familiar with the litigation process as it affects bilingual education programs. Detailed descriptions of the participants in civil rights litigation, including bilingual-bicultural lawsuits, are provided. The roles that class members, clients, attorneys and educators play in the litigation process are clarified. A case study is used to exemplify the process explained. Each step, from the initial complaint through "El Vacio" (the void or extent of time that litigation goes on with no definite action taken), to the presentation of proposed remedial programs or action for resolving the complaint and attorneys' fees, is described. The negative and positive impacts that desegregation has on bilingual-bicultural education programs, particularly as they affect the Puerto Rican community, are discussed. Appendices provide information on various aspects of civil rights litigation, including problems of implementing bilingual-bicultural programs in desegregating school districts. (Author/EB)

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LAW AND BILINGUAL EDUCATION: A MANUAL FOR THE COMMUNITY

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Law and Bilingual Education: A Manual for The Community

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ERRATA SHEET

p. 8	5th line, should end in the U.S.
13	4th " , 2nd paragraph, should begin: These are questions
16	line 12, erase comma after seek
20	9th line, educational opportunity
"	7th line, 2nd paragraph, erase comma after usually
25	last line, comma after members
38	12th " , erase 1st the, change to at
48	3rd " , 3rd paragraph, erase period after programs
81	line 5, accent on vacío
85	1st line, insert Action (Class Action Certification Motion)
106	2nd paragraph, line 3, these sections
111	" " , " 6, simply "intervenors"
115	" " , 1st line, brought

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INTRODUCTION

During the 1960's Puerto Ricans and other Hispanics began a sustained movement aimed at achieving bilingual education in public schools. Community groups throughout the country filed lawsuits to force recalcitrant school districts to implement programs; lobbying was conducted at the state and federal levels to entice lawmakers to pass legislation. In 1968, the Bilingual Education Act, Title VII, of the Elementary and Secondary Education Act, was passed by the United States Congress to meet the special educational needs of children who could not effectively participate in the English-only educational setting. But legislation did not give rise to the widespread use of bilingual education. In fact, bilingual education has become a reality mainly as a result of struggles waged by community groups throughout this country, long before passage of the Act.

In the mid-19th century, bilingual education was employed in different areas of the country to instruct the children of immigrants. Between 1839 and 1880, some schools in the mid-western states used German as a language of instruction. Spanish was used in the Southwest, and French in New England and Louisiana. This was the case in both public and private schools.

As is the case today, early proponents of bilinguality in public education met hostility. The xenophobia which was present in the English-speaking communities in the late 19th and early 20th centuries was heightened by the impending war with Germany. This resulted in the promulgation, by state legislatures, of laws which mandated that school instruction was to be conducted solely in English. These laws were made applicable to public as well as private schools.

Thus, by 1919, Nebraska, Ohio, Iowa and other states had passed laws which prohibited instruction in a language other than English for any child below the eighth grade. Teachers who violated these laws could be imprisoned or fined. Language could be taught, however, as a specific subject.

Foreign language speakers turned to the courts to challenge these educational policies. In Nebraska, a teacher was convicted of teaching in German in a parochial elementary school. The case was appealed to the Supreme Court which held, in 1923, that the liberty guaranteed to the teacher by the Fourteenth Amendment included "education and acquisition of knowledge." The use of a foreign language as a medium of instruction in parochial or private schools could not be prohibited by the states. Thus, parents with the financial ability to pay for private education which was conducted in their native language, could do so without fear of intrusion by the state. For public education, parents had no such right.

The assimilationist policies espoused by governments, designed to replace or subordinate the language and culture of those who came from foreign countries to English and the "American culture," were somewhat altered during the 1950's and 1960's. In response to the Soviet Union's gains in space, Congress enacted in 1958 the National Education Defense Act, which encouraged, in the interest of national defense, the teaching of math, science and foreign languages. The arrival of hundreds of thousands of non-English speaking Cubans into the Miami area provided the motivation for the creation of bilingual education programs in Florida. Moreover, studies conducted by the United States Civil Rights Commission on the educational plight of Chicanos in the Southwest and Puerto Ricans on the East Coast, plus the litigation and pressure applied by Hispanics, gave added impetus for the passage of the Bilingual Education Act of 1968. Massachusetts, Texas, California, Wisconsin, Illinois and other states joined the bandwagon and passed legislation which mandated bilingual education in school districts which contained substantial numbers of children of limited English language ability.

The federal law, as well as those of probably all states, are compensatory in nature. They were enacted to "compensate" or "make up" for the "language deficiencies" of the school children and were intended to serve, like many other programs, "the culturally disadvantaged." Their purpose was to "correct the problems" of the school children as fast as possible so that they might begin to function in the regular school curriculum. The consequence of this has been that the programs, as well as the participants, have been stigmatized and the programs, in many cases, have not been accepted as quality, positive experiences for students.

In 1964, Congress passed Title VI of the Civil Rights Act of 1964. This law was to become another weapon in the growing arsenal for bilingual education advocates who discovered and chose the legal route to implement programs, mainly because the courts had proven to be the fastest way to achieve change. Title VI prohibits discrimination in any program receiving federal assistance. The Department of

Health, Education and Welfare (HEW) issued regulations which interpreted and expanded upon Title VI. These regulations provided that local school boards which receive federal assistance have "an affirmative duty to take prompt and effective action to eliminat(e)...discrimination ...based on national origin, and to correct the effects of past discrimination." Public schools which receive federal dollars and which fail to provide Spanish-speaking children with an equal educational opportunity are in violation of Title VI. HEW guidelines promulgated pursuant to Title VI require that:

> Where inability to speak and understand the English language excludes national origin minority group children from effective participation in the educational program offered by a school district, the district must take affirmative steps to rectify the language deficiency in order to open its instructional program to these students.

In 1972, the Supreme Court decided the validity of the HEW regulations in Lau v. Nichols, a case involving Chinese-speaking students from San Francisco who had been excluded from full and equal participation in the public schools because of their inability to effectively function in the English-only school system. The Court held that the federal government had the power to require school districts which receive federal funds to take affirmative steps to accord national origin minority group children an equal educational opportunity. Although the Court did not endorse bilingual education or any other program of instruction, advocates of bilingual education who have used the courts to redress the educational plight of their children, have used the case as precedent (see Appendix A for the court's opinion).

In New York City, the plaintiffs in Aspira v. Board of Education used the Lau decision as a bargaining tool in negotiating a consent decree in which the affirmative steps required in the Lau case were interpreted to mean bilingual education for Hispanic children in New York City. (See Appendix B for several court decisions in the Aspira case.)

The push for bilingual education has been a response to a general need to improve education, not merely a desire by parents to have their children learn English or retain Spanish. Educational issues raised in the 1960's and 1970's, such as: community control, head start, cultural pluralism, follow through, as well as bilingual education, were alternative concepts aimed at making schools more relevant and responsive to the needs of Black and Hispanic children, and to children of working class parents.

Almost from the inception of the movement for bilingual education, its advocates have, sometimes among themselves, and at times with others, expended much energy in arguing whether the preferred program is the transitional bilingual education model or the maintenance model. Transitional bilingual education, as its name suggests, attempts to bridge the gap to the second language by using the native language for instructional purposes only until the child can function in English. At that point, the child is "mainstreamed" into an English monolingual classroom setting. Some states have limited by law the number of years a student can participate in the program, as, for example, in Massachussetts, where three years is the limit.

Maintenance bilingual education differs from the transitional model in that its goal is literacy in both languages. After reaching proficiency in English, the student continues to receive instruction in English and in his/her native language. This model is preferred by most bilingual education advocates because it gives continuity to the child's learning in the home, and builds upon the student's assets. Cultural components are usually found in both models in varying degrees. The tendency is to speak of both models as being bilingual "bicultural" (or multicultural) education programs.

The National Puerto Rican Task Force on Educational Policy, in its Toward a Language Policy for Puerto Ricans in the United States: An Agenda for a Community in Movement, published in 1977 as the first volume in a two-volume series of which this document is the second volume, introduces a concept which is more encompassing than the bilingual education concept as it is now known, and transcends the transitional/maintenance dichotomy.

In setting forth its proposal for a language policy for Puerto Ricans in the United States, the Task Force calls upon the Puerto Rican community to begin to strive toward achieving bilinguality in our community in the United States. By this it is meant that the community would aim toward having as many people as possible, within the community, acquire competence in English and Spanish. Implicit in this idea of bilinguality is the concept of mother tongue retention. This means not merely "maintenance" of Spanish for native speakers, but the passing of both languages to their children.

In the educational setting, education for bilinguality would be the term used. The goal would be spoken and written command of the standard dialect in Spanish and English. This should not be taken to mean a downgrading or rejection of other dialects, vernaculars or other linguistic combinations. In fact, it is the Task Force's position that the language forms brought to the schools by Puerto Rican children should be used and incorporated into the learning process. The educational arena is but one area, albeit an important one, where we must strive for bilinguality. Bilinguality should be the norm in all areas and institutions which affect Puerto Rican life.

The Task Force also proposes the establishment of a language and education institute which would, among other things, coordinate research and study on education and language issues which affect Puerto Ricans in the United States.

This manual was written by members of the Task Force in order to help community workers become more familiar with, and perhaps better understand, the litigation process as it is used to obtain, expand, or protect already existing bilingual education programs. The ever growing number of bilingual education lawsuits in existence and contemplated in the different areas of the country have caused many community workers involved in these lawsuits, as well as many not involved, to raise questions about the intricacies of the litigation process. Indeed, many have questioned the process itself. This manual attempts to deal with some of those questions. It also raises many new questions. It is hoped that those who read this manual will gain a basic understanding of what the litigation process is about, as well as the elements that lend force and importance to the movement for bilingual education. It is also hoped that the reader will begin to understand the usefulness, but more importantly, the limitations of the law in achieving educational reform.

THE ACTORS IN THE LITIGATION PROCESS

In all civil rights litigation, including bilingual-bicultural lawsuits, there are several actors or participants, each playing a very definable role. Depending on the role which the actors play in the lawsuit or the benefits which they derive, they can be categorized as class members, clients, attorneys or educators.

The Class and Clients

Generally, class members* in a bilingual education lawsuit are those ultimately affected by the outcome of the lawsuit. All Puerto Rican and other Hispanic children who attend schools in the school district where litigation is contemplated and who cannot learn or communicate effectively in the English language, and who are not enrolled in bilingual programs, or who are enrolled in inadequate programs, are members of the class. Likewise, the parents of such children are members of the class since they are directly concerned with the quality of education which their children receive and are aggrieved by the failure of the school district to provide their children with adequate educational programs. In any event, they are the legal representatives of their minor children. Because the size of the class is usually too large to make it practical for all of them to join in the lawsuit, their interests are represented by the named plaintiffs. A plaintiff is a person who sues another. The person who is sued is the defendant.

Clients are those persons in the class who have signed a retainer authorizing a lawyer or group of lawyers to represent them in

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[*] The term "class" used herein does not refer to a socio-economic grouping. It is a legal term used to refer to a very large category of persons who have a similar problem, or, as the legal writers say, "are similarly situated."

a lawsuit. The retainer is a contract signed by the prospective client as well as the attorney. It states that the attorney has agreed to be "retained" to handle the case. It also states the conditions, if any, under which he is taking the case, and the fee, if any. This contract allows the lawyer to use the names of these persons in the lawsuit as named plaintiffs. However, not all those who sign retainers will become clients. For one reason or another the lawyers may decide that an individual or organization who signed a retainer will not be used as a plaintiff. It may be that there are already too many plaintiffs; or a particular individual or organization, in the lawyers' view, does not fit into the category of plaintiffs that the lawyers feel will best exemplify to the court the problems in the particular school district.

For example, if a child cannot learn effectively in English, but is enrolled in a good bilingual program, he may not be a good plaintiff because he would not be representative of the problem which exists in the particular school district, since the lawsuit seeks to vindicate the rights of those who are in no programs or in inadequate programs. A good representative would be one of the many Puerto Rican and other Hispanic children who cannot function effectively in an English-only curriculum, who are not provided programs, or are enrolled in inadequate programs. Similarly, a community organization, although it may be actively seeking to have bilingual education implemented in the school district, may be disqualified as a plaintiff by the lawyers, and if not, then later by the court, if the organization does not have members whose children need bilingual education programs and are not receiving them, or the organization has not been authorized by its membership to initiate the type of lawsuit contemplated. Thus, it is from the class that the lawyers choose individuals or organizations who will serve as their clients for purposes of the lawsuit and who will become named plaintiffs. The practice of attorneys selecting the clients they will represent is a deviation from the normal procedure whereby the person seeking to institute a lawsuit chooses the attorney. This will be discussed in the Client/Attorney Relationship section.

Throughout this document we will be referring to "the community organization." These are groups which exist in many of our communities and are usually formed to fight against social injustices and to seek reform. Sometimes they are formed specifically to deal with the bilingual education issue, and only for the duration of any court case, but in many instances they are already in existence when this issue arises and will continue to operate after it is resolved. The organizations may include among their membership parents, teachers and other community people. They have usually been incorporated pursuant to the not-for-profit corporation laws of their particular state and are not money-making enterprises.

Among the functions performed by these groups in the bilingual education lawsuit are: mobilizing the community around the lawsuit; serving as spokespersons for the plaintiffs and the class; providing meeting places in the community; aiding the lawyers in whatever capacity is deemed necessary; serving as a liaison between the lawyers and the community; and performing whatever tasks are necessary in furtherance of the lawsuit. In most instances they also serve as plaintiffs. Community organizations are not legally required in order to initiate a lawsuit, however, they are very much needed. Their importance is not limited to performing the above-mentioned tasks. They can also help to give the appearance to the court and to the defendants of a strong, organized and united community. This may encourage the defendant school district to enter into negotiations with a look toward settling the case for fear of entering into a long and hard legal battle against such a formidable foe!

Civil Rights Attorneys

One of the prime actors in any legal action is the lawyer. Ultimately the community worker, the parent and the educator must deal with the civil rights attorney. Who is he? What is his background? How may a client best relate to him? There are questions which are usually not raised by the potential client, but which bear on the role of this actor. In general, the lawyer is a member of a profession which numbers approximately 400,000 in the United States. He probably graduated from a four year college and then went on to law school. In law school, during his first year, he probably took courses in contracts, torts, federal civil procedure, constitutional law and legal writing. Thereafter, he probably took courses in corporations, taxation, bankruptcy, estates, property, legal accounting, criminal law and procedure, administrative law, agency, commercial transactions and secured transactions. The majority of these subjects relate to business or property relationships of one kind or another. Depending on the law school he attended, the civil rights attorney may have had a course in political and civil rights, or possibly took no such course and depended on one course in constitutional law for his introduction to civil rights. Generally, the law schools do not prepare attorneys for the civil rights field. Bilingual education lawsuits are considered civil rights cases.

The civil rights attorney has probably gained expertise in the area during his first year or two out of law school while working for a legal services office, or for one of the six major civil rights defense organizations.[1] However, this pattern may soon change since most civil rights organizations are now requiring that attorneys have experience in the field before they can be hired. Very few civil rights attorneys are from minority groups. One reason for this is that the field is not financially rewarding for the few minority graduates of law schools who are usually deeply burdened by debts incurred in financing their education. Puerto Rican attorneys are found working for federal or local government agencies, legal services agencies, in private practice, and more recently in corporate and labor law. Other Puerto Rican attorneys have entered politics or have become administrators of one kind or another. There are approximately 175 Puerto Rican attorneys, who potentially service a national Puerto Rican community of two million, and only a handful devote themselves to civil rights law. Indeed, New Jersey with approximately 137,000 Puerto Ricans has fewer than twenty Puerto Rican attorneys; Connecticut with over 38,000 Puerto Ricans also has fewer than ten; and Boston with 7,000 Puerto Ricans[2] has fewer than five. However, in recent years there has been an upsurge in the number of Hispanics gaining acceptance to law schools. But, of course, those who graduate are not guaranteed a position in the civil rights field (or anywhere).

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[1] The Puerto Rican Legal Defense & Education Fund, Inc.; The Mexican American Legal Defense & Educational Fund, Inc.; Center for Constitutional Rights: NAACP Legal Defense & Education Fund, Inc.; American Civil Liberties Union; and The National Association for the Advancement of Colored People.

As a result, most of the civil rights attorneys that the Puerto Rican and other Hispanic client will come in contact with will be non-Puerto Ricans and non-Hispanics. They will normally have little or no knowledge of Spanish and must depend on interpreters for their communication with non-English speaking clients. Moreover, their law school training has not prepared them to deal with clients who are unable to articulate precisely the nature of their grievances and desires.

Client/Attorney Relationship

The traditional relationship of client and attorney is that client hires an attorney to solve a particular problem or to provide a specific type of advice. If the client is not satisfied with the lawyer's work or advice, he can dismiss the lawyer at will. In the civil rights field this relationship becomes distorted. Rather than hire and pay for the services of a lawyer, a community or group of parents ordinarilly attempts to interest a civil rights organization or a legal services group in the merits of their case. The agencies usually do not commit themselves to taking the case until they investigate and determine that filing the suit will be profitable,[3] of that the case can be won.[4] Moreover, these agencies do not charge clients. They rely on foundation, corporate or government contributions to conduct litigation. Consequently, these agencies do not take on all cases brought to them. Indeed, many meritorious cases are turned away.

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[2] All population figures obtained from the 1970 U.S. Census.

[3] There is a possibility that if the case is won, the court may allow such agencies to gain attorney's fees from the defendants.

Once the agency decides to take the case, the lawyers may disqualify potential plaintiffs for various reasons. In addition to the reasons already discussed, lawyers may sometimes disqualify potential plaintiffs because of political, philosophical or other non-legal reasons. It may be that one who has signed a retainer, or is willing to sign a retainer and become a plaintiff in the lawsuit feels that the suit should be litigated in a certain fashion or that the remedy sought should be a maintenance program rather than a transitional program. The lawyers may disagree and find the differences irreconcilable and thus choose to omit the individual from participation in the suit. It may be that a community which wants to file a lawsuit will seek, to dictate how the lawsuit is to be conducted. They may insist that a Puerto Rican or other Hispanic attorney who either works for the law organization or lives in the community be assigned to work on the case. The legal organization's position may be that clients or potential clients will not dictate to them how to conduct a lawsuit. The law organization may then choose to bring the lawsuit without participation of the community organization. If the suit cannot be brought without the participation of the community group, the law organization may disqualify itself, whereupon, the community group must seek other counsel.

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[4] Since these agencies generally employ small legal staffs and since their funds are not unlimited and since, generally, it is their policy to attempt to persuade the courts to make new and/or good law, whether or not a case can be won and whether it has potential for establishing good law are important considerations.

When a community organization or a group of parents is attempting to interest a law agency in a particular lawsuit, in the initial contact, or shortly after the retainers are signed, ground rules for the working relationship should be discussed. It should be clear that the attorneys are conduits for the community's legal desires; and that they are not independent policy planners for the community. The community group should demand that its members be present and active at all news conferences, and that they be consulted before all major legal and non-legal decisions are made. If the community does not take charge from the beginning, or establish itself as the guiding force that moves the lawsuit ahead, the lawyers will make all the important decisions and will be free from any type of accountability. It is important that the basis of the future relationship be set out at the very beginning, in order to avoid any misunderstandings that might arise later. It is also important to realize that lawyers do not have all the answers and that they must and should depend on their clients for guidance.

The legal profession, for all the training that its members get, is the last bastion of the generalist. It is the only profession whose members are confronted with new topics or concepts each time they take a case. Experts are continually used to instruct attorneys. Whether these be experts on vinyl chloride, noise, homicide, medicine or bilingual education, their role is to educate the lawyer as to the particulars, so that he can successfully prepare for trial. Despite the fact that a lawyer may become extremely knowledgeable in any one of these areas, he cannot be considered an expert in the area. He lacks the years of training, research, keeping up with the new literature in the field, and the particular sensitivity in the topic that the trained expert has. Accordingly, it is best for any community to identify experts for the lawyer, to review experts proposed by lawyers, and to be wary of lawyers claiming expertise in any area other than law. What must be maintained in the civil rights areas, as in any traditional area of law, is a healthy client-attorney relationship, with the client exercising the same role and authority as in any private litigation.

Active and Inactive Clients

Once litigation has commenced with the filing of the complaint in court, the clients who have been named in the complaint usually assume either an active or inactive role. After the suit is filed, there may pass a long period of time during which the maneuvers and strategy being pursued by the attorneys of both sides are almost exclusively legal and technical in nature. During this period, which we call "el vacío" (void), much interest is lost in the lawsuit because the attorneys usually may not inform the clients of the developments in the suit nor seek their help and participation. The active clients and active non-clients, however, come forward to fill the void.

Active clients play a very important role in bilingual-bicultural education litigation. They maintain constant communication with the attorneys and serve as the attorneys' contact in the community; they obtain information for the attorneys relative to other clients or to the school system; they organize meetings between the attorneys and the clients and inform the other clients, the community and the press about developments in the lawsuit. When the attorneys feel comfortable working with the active clients, they will rely upon them heavily and the active clients will have great influence in determining the type of educational program implemented as a result of the lawsuit.

The inactive clients are those who, once the lawsuit is commenced, may never be heard from again. Nor are they usually sought out by the attorneys, expect when absolutely necessary, such as when the defendants request additional information regarding all the named plaintiffs. Inactive clients fulfill their function by being representative of the problem that affects Hispanic children in the school district and merely lend their names and characteristics to the lawsuit. They may have little influence in determining or selecting the type of bilingual program which will result from the suit. The inactive client category comprises by far the largest group of persons named in the lawsuit.[5]

Sometimes the inactive clients become "active" to the extent that they are gathered for a meeting by the active clients to be informed of any important developments; or for a meeting with the lawyers; or for the client-children to be tested for English or Spanish proficiency. It should be noted that without the inactive clients the lawsuit could not be won. The children of inactive parent-clients generally have the most difficulties in functioning in the English-only school curriculum, and would benefit the most from bilingual education programs. The lawyers use the educational plight of the inactive clients' children to dramatize to the court that the right of Hispanic children to equal education opportunity has been violated and that the implementation of bilingual education will help to rectify the problem.

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[5] In one lawsuit in Connecticut there were approximately twenty named individual plaintiffs, all of whom were inactive. There was also an organizational plaintiff, three of whose members were active. The latter three were all Puerto Rican. One was a female in her sixties with a daughter who attended college. The other two were males. One of these males did not live in the Puerto Rican community and had two young children, neither of whom would be eligible for bilingual education under most present state or federal standards. The other male had high school and college age children, none of whom would be eligible for bilingual education. In a lawsuit filed in New York State, there were approximately twenty named plaintiffs and one organizational plaintiff. Members of the community organization were active while the named plaintiffs were not.

Another category of actors involved in the bilingual-bicultural education lawsuit is what we call the "active non-client." The active non-client is a person who is not a named plaintiff and who has not signed a retainer authorizing the attorney to represent him in the suit. The active non-client may not even be a member of the class, that is, a person ultimately affected by the outcome of the lawsuit. Active non-clients are usually, sophisticated, articulate individuals who are usually involved in almost all community issues. They are sometimes teachers, sometimes members of the organizational plaintiff or some other community group.[6] They may or may not be Puerto Rican. Active non-clients play a very important role in the litigation--identical to the role played by active clients. Attorneys usually feel most accountable to active clients and active non-clients.

In some cases, the active non-client, such as a particular group of teachers, may have greater influence in determining the type of bilingual program which results from the lawsuit than the inactive clients. This is generally due to their particular expertise, interests or the rapport they may establish with the attorneys. The active non-clients oftentimes are most compatible with the attorneys since they can bring to the lawsuit their own experiences with the community and can articulate comprehensive answers to the questions of the attorneys. It is important that all clients be active clients. It is the active client who is most informed about the complexities of the lawsuit and of its progress. In addition, the client who is informed and active is more likely to influence the progress and outcome of the lawsuit.

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[6] Members of the organizational plaintiff may be active non-clients. The organizational plaintiff which is also active is, of course, properly characterized as an active client since it has retained the

Teachers and Administrators

The educator plays a very important role in bilingual education lawsuits. Lawyers and clients call upon educators to articulate the educational problems of the school district and to help formulate pedagogical and legal arguments in support of bilingual education. Educators also help to equip attorneys with the educational jargon and some of the expertise needed to initiate a bilingual lawsuit. Since educators can explain the community's position in both professional and layman's terms, lawyers use educators to reinforce their arguments, and clients utilize them to interpret their situation and the possible solution.

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6 (cont'd)
lawyers and is a bona-fide client. On the other hand, most of its members are not individual clients of the lawyers. However, some of its members may also be clients--active or inactive.

In a bilingual education lawsuit, teachers can assume an interpretive or intermediary role. They may be required to:

1. Interpret the problem to the lawyer;
2. Interpret what the lawyer says about the problem to the client;
3. Interpret the problem to other educators and professionals;
4. Interpret the problem to the courts as professional educators or as expert witnesses;
5. Interpret to the courts possible solutions as expert witnesses and as participants in the formulation of educational plans submitted to the courts;
6. Interpret the solution to the named plaintiffs and to the community;
7. Interpret to other educators the final educational plan ordered by the court; and
8. Assist in implementing and monitoring the final educational plan ordered by the court and to interpret this plan to parents and students on an ongoing basis.

Clients, other participants and attorneys should be familiar with the training and background of the educators so they can be aware of the educators' limitations and potential. Every teacher and administrator must have received a degree from a four year accredited college. Upon graduation from college, they are considered eligible to teach in the public schools, with the sole requirement that they pursue post-graduate work to obtain a masters degree.[7] During their actual teaching experience, teachers sharpen their skills using their college and graduate school training as reference points. Young teachers attempt to reconcile their general training to the realities of the schools in a variety of ways.[8]

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[7] In some states, e.g., New York, California, teachers must pass a licensing examination. If the exam is passed, the teacher receives a temporary license, which becomes permanent when a masters degree is obtained.

Some teachers, as well as administrators, question school policies and services provided to students. Consequently, they may find themselves at odds with the school establishment.[9] Among these are individuals who assist parents to become more active in the parents' associations; or, who seek to articulate the needs of the children and the local community to school authorities; or, who actively campaign for the implementation of bilingual and bicultural programs. These individuals may be most invaluable to lawyers filing education lawsuits against the school district since they can identify with particularity the problems within their schools, while also being able to rally support from students and parents. Such persons, while few in number[10] are extremely important and play crucial roles in the development of bilingual education lawsuits. They are also helpful to attorneys because they can help to form the professional cadre of participants that will support and actively engage in major bilingual education litigation.

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[8] But reliance upon educational training may be misplaced since many teachers have complained at the beginning of their careers that their school training failed to prepare them for the reality of the public schools.

[9] Unfortunately, such persons may be harassed or suffer retaliation from school authorities. Negative comments and evaluations may be placed in the teacher's personnel file. The duties of such persons may be limited; they may be reassigned to other teaching or non-teaching functions; or they may be removed entirely from the school and from any communication with parents. Many teachers who actively support the implementation of bilingual education find themselves in this predicament. One such teacher in a New York suburban community was reassigned from teaching duties to evaluating obsolete textbooks in the basement of the Administration Building.

[10] In 1970-71, in New York City, there were nearly a quarter of a million Puerto Rican and other Hispanic school children or 22.8% of the public school population. There were over 60,000 teachers. Of this number, approximately 1% were Spanish-surnamed, and of the 932 principals working in the public school system, only 8 were Spanish-surnamed. Nevertheless, these Puerto Rican teachers and administrators were invaluable to the attorneys who brought the bilingual education lawsuit against the New York City Board of Education.

Civil rights attorneys usually assign these teachers and administrators to expert and interpretive roles, which places upon them the burden to produce evidence of the harm suffered by Puerto Rican and other Hispanic children in the local schools. This may require that the teachers and administrators testify in court to show, for example, that non-English speaking Puerto Rican children in the school system score several grades lower on reading tests than English-speaking children of equal intelligence; or that the former are several grades behind their age group.

The teachers or administrators who are the best witnesses in court for the plaintiffs are those who favor the implementation of bilingual education and who can document and articulate the problems that non-English speaking Puerto Rican children have in the school system. The teacher or administrator should be very familiar with the bilingual education concept and should be prepared to state why it is preferable to English-as-a-Second Language (ESL) or traditional methods.

One major problem which often faces teachers and administrators who get involved in bilingual education litigation is their inability to ascertain whether or not a viable and comprehensive education plan which they favor may be legally acceptable by the courts. To the extent that teachers and administrators do not understand what types of relief are legally acceptable, they may compromise a sound educational plan in the name of legal expediency. In this regard, it is the responsibility of teachers to give a full explanation of the concept of bilingual education as well as of the different permissible options to the community so that they can be in a position to support or reject the proposed educational plan with complete knowledge. It is important that teachers, administrators and community members explore the various alternatives available before deciding what plan they feel is acceptable from an educational viewpoint, which at the same time is acceptable in the court. They should determine whether the constraints articulated by the lawyers are limitations imposed by the law or by the attorneys' educational philosophy or view of the case. It is the teachers and administrators with the community members who are the experts in the formulation of the educational plan and not the lawyers. Where these roles are reversed, and the lawyer is permitted to formulate an educational plan or is given a veto power on the plan to be submitted to the court, then the community, teachers and administrators have abdicated their role as primary movers of the lawsuit and the affected school children may ultimately be recipients of an education which is no better than the one under attack.

Finally, teachers and administrators must be sure to maintain constant communication with students and members of the community and to receive input and feedback on their proposed educational plan. It is members of the community, the teachers and administrators who will have to apply and implement whatever educational plan is ordered by the court, and, while the lawyers may walk away from the community and school district at the end of the lawsuit, the community members the teachers and administrators cannot.

Questions The Actors Must Address

To ensure optimum involvement in the lawsuit (that is, to participate comfortably and effectively), those intending engagement in the lawsuit should seek answers to the questions which we pose in this section. Some of the questions can be answered for the client or the community person by the educator or the lawyer. Others, they will have to answer for themselves.

Some of the questions should be directed to the attorneys. This can be done by members of the community organization, those who are initially seeking a lawyer who is willing to file the suit, or the clients. The answers to many of the questions intended for the attorneys will help to determine the type of relationship that will be had with the attorneys and the input and influence that the community will have in directing the lawsuit.

We also suggest questions that the educators can ask themselves. These will hopefully aid them in planning the extent of their involvement, as well in preparing for what may be stormy confrontation with school board members and school administrators.

There may come a time during the course of the lawsuit, or during the implementation of the resulting program, when those who had a hand in the lawsuit will have to answer these questions for someone.

Questions to be posed by prospective clients:

A. To what extent should I become involved in this lawsuit?

  1. Should I become a named plaintiff?

    2. Should I allow the lawyers and other community persons to meet with and test my children to see if they would benefit from a bilingual-bicultural program, but not become a named plaintiff?

    3. Should I actively participate but not lend my name or that of my children to the lawsuit?

B. What does my role as a named plaintiff entail?

    1. Will I attend court proceedings?

    2. Will I have to give an affidavit (sworn statement)?

    3. Will I have to give a deposition (answer oral questions outside of the court under oath) to the attorneys of the school district?

    4. Will I be consulted on any final settlement?

    5. Will I be called to testify as a witness in any trial or hearing?

    6. Will meetings be held in the community, and will I attend?

    7. Will I be consulted by the lawyers? the teachers? the community organization?

    8. Will I be involved in demonstrations?

    9. Will there be a newsletter to inform us of the progress of the lawsuit?

    10. Will there be one person that I can call for information on the lawsuit?

C. How shall I monitor compliance with the terms of the lawsuit or any order of the court?

    1. Will I help make reports to the community organization on compliance or violation of a court ordered program?

    2. Will I help gather information on the programs established by the school district?

    3. Will I report the results of the program on my children to the parents' organization?

    4. Will I assist the community organization in preparing reports on the state of compliance?

    5. Will I testify as a witness in any proceedings to enforce the court ordered program?

6. Will I help raise funds to pay for the costs of monitoring?

7. How will I work with the teachers in the program and the administrator of the program to insure that the terms of any court order are in fact met?

D. What does my role as a member of the community organization involved in the lawsuit entail?

1. Will I help to find parents whose children cannot function effectively in the English-only schools so that these can become involved in the lawsuit?

2. Will I interview children to identify those with the kinds of needs to be addressed by the lawsuit?

3. Will I participate in demonstrations?

4. Will I be involved in any negotiations with the school authorities?

5. Will I give depositions to the attorneys of the school district?

6. Will I be called to testify as a witness in any trial or hearing?

7. Will I be called upon to provide an affidavit or to assist the lawyers in obtaining the affidavits of others who have the information sought?

E. What should I be thinking about during the implementation of the bilingual program?

1. What is the extent of parental involvement that any program should have?

2. What are the purposes to be served in any educational program?

3. What do I want my child to learn from an educational program?

4. What types of educational personnel should be recruited for the program?

5. What level of funding should be provided to meet the needs of this program?

6. Do I favor maintenance bilingual education or transitional bilingual education?

7. How should my child be tested for progress in the program?

8. Who should appoint the administrators of the program?

9. How shall the administrators of the program remain accountable to: the parents? teachers? and school authorities?

Questions to Ask the Lawyers:

1. Under what conditions will they take the case?

2. What role, if any, will the community play in shaping the complaint?

3. Will the legal organization allow the community to select which attorneys will be assigned to conduct the lawsuit?

4. Will the community help to develop the plan for relief which will outline the type of program the school children may receive?

5. Can the community share in any attorneys' fees that the legal services or defense fund will receive?

6. Will the community be permitted to oversee and/or monitor the implementation of any program secured by litigation?

7. Will resources be made available to the community to monitor the implementation of any program, including but not limited to sharing in any attorneys' fees?

8. Will the attorneys consult with the community on any and every motion brought by or defended by the attorneys?

9. Will the attorneys invite the participation or the attendance of the community at each court proceeding in the litigation of the lawsuit?

10. Will the attorneys meet with members of the community and keep them informed of each step taken in litigating the lawsuit, including discovery and the shaping of a final program for relief?

11. Will the community be able to veto a particular litigation strategy and/or the types of programs or final plans proposed by attorneys and their experts?

12. Will the attorneys allow the community to meet with experts engaged in their behalf, in order to discuss the nature of the suit as well as the expert's contribution?

13. What will be the extent of the involvement of the organizational plaintiff in the lawsuit?

14. Will the community be permitted to issue press releases and public notices regarding the litigation?

15. Will community members receive copies of all legal papers filed in the lawsuit as well as explanations prepared in language understandable to laymen?

16. What will be the role of any local counsel? Will the out-of-state defense organization attorneys be accountable to the community and to the local counsel; and, if so, in what form?

Questions to be posed by educators:

What will be the extent of my involvement in the lawsuit?

1. Will I help organize parents for the lawsuit?

2. Will I assist the lawyers to organize meetings with parents and children?

3. Will I identify children who are Hispanic?

4. Will I identify Hispanic children who cannot function effectively in the English-only curriculum?

5. Will I become a member of the community organization?

6. Will I attempt to obtain and evaluate for the lawyers statistics and facts which may be available from the school system which tend to portray the educational plight of Hispanic children in the school system?

7. Will I identify what programs are in need of improvement?

8. Will I work with the Parent-Teacher Associations on behalf of the lawsuit?

9. Will I encourage parents to attend meetings of the community organization?

10. Will I participate in demonstrations?

11. Will I attend court proceedings?

12. Will I be called upon to give an affidavit regarding information I may have about the school system?

13. Will I be called as a witness in any trial or hearing?

14. Will my activity on behalf of the lawsuit be protected by the First Amendment of the Constitution of the United States and by other laws and cases?

15. Will the attorneys involved in the lawsuit represent me or bring a suit on my behalf if the school board fires or disciplines me because of my activities in connection with bilingual education?

Some general questions which the educator should consider for implementing the program:

1. What should constitute a model bilingual-bicultural program?

2. Which bilingual program model best meets the educational needs of the children and the aspirations of the community?

3. How should students who need the program be identified?

4. How will the progress of students in the program be measured?

5. What should be the student/teacher ratio in the bilingual program?

6. What courses should be taught in Spanish? in English? in different combinations of English and Spanish?

7. What activities should the children in the program share with other students in their school who are not in the program?

8. How should the bilingual school curriculum change from year to year?

9. What kind of materials will be necessary in order to support the needs and aims of the curriculum?

10. How will teachers be recruited for the program? Will they have to meet any licensing requirements? Will current licensing requirements have to be changed in order to obtain the necessary number of teachers?

11. Will community and senior colleges be encouraged to train prospective personnel for the program?

12. How will teachers keep up with new developments in bilingual education in the rest of the country?

13. What methods should be employed in teaching students in bilingual programs?

14. When should a student enter a bilingual program? When is the best time for him/her to leave?

15. How do you measure a teacher's competence in Spanish and English? A student's competence?

16. What kind of measure will be developed to assess the effectiveness of the program?

17. What level of funding will be necessary to support this program?

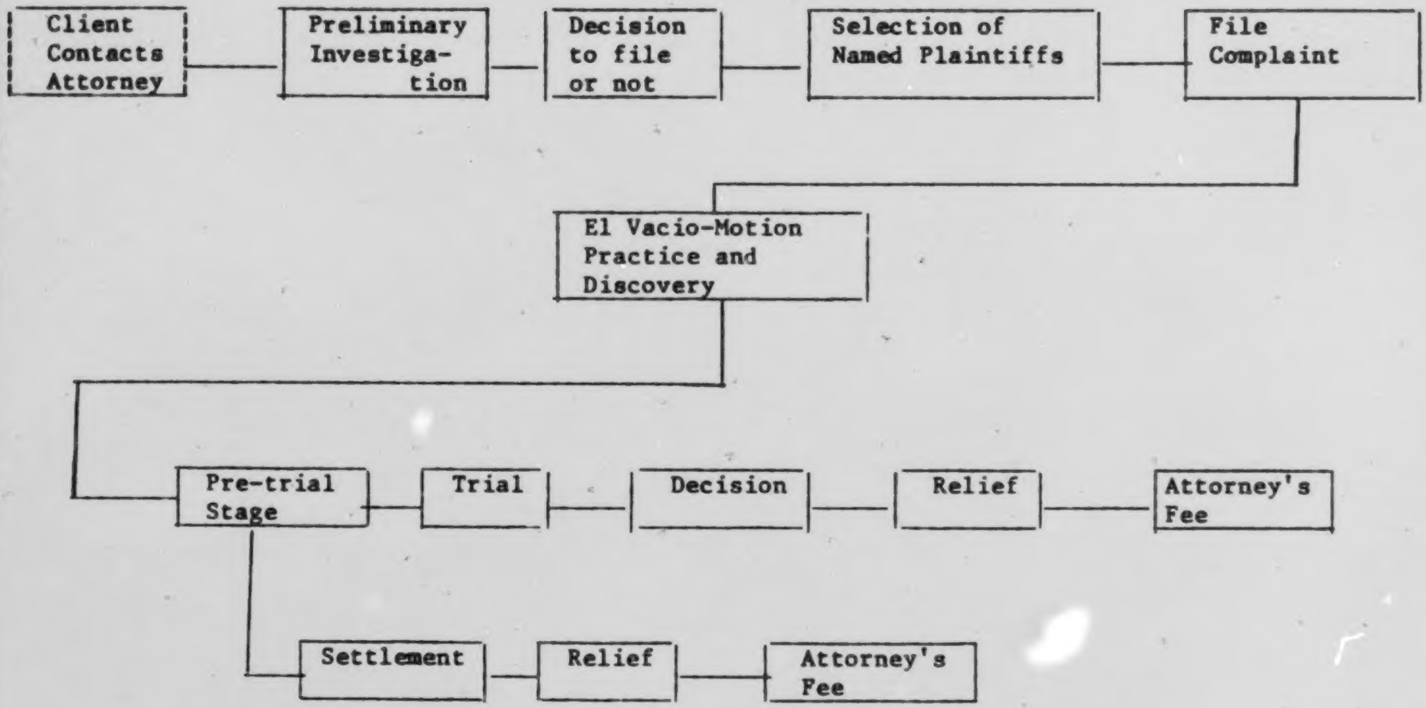
18. What should be the source of such funding (city tax levy, state or federal)?

19. What will be my role in monitoring compliance with the court ordered program?

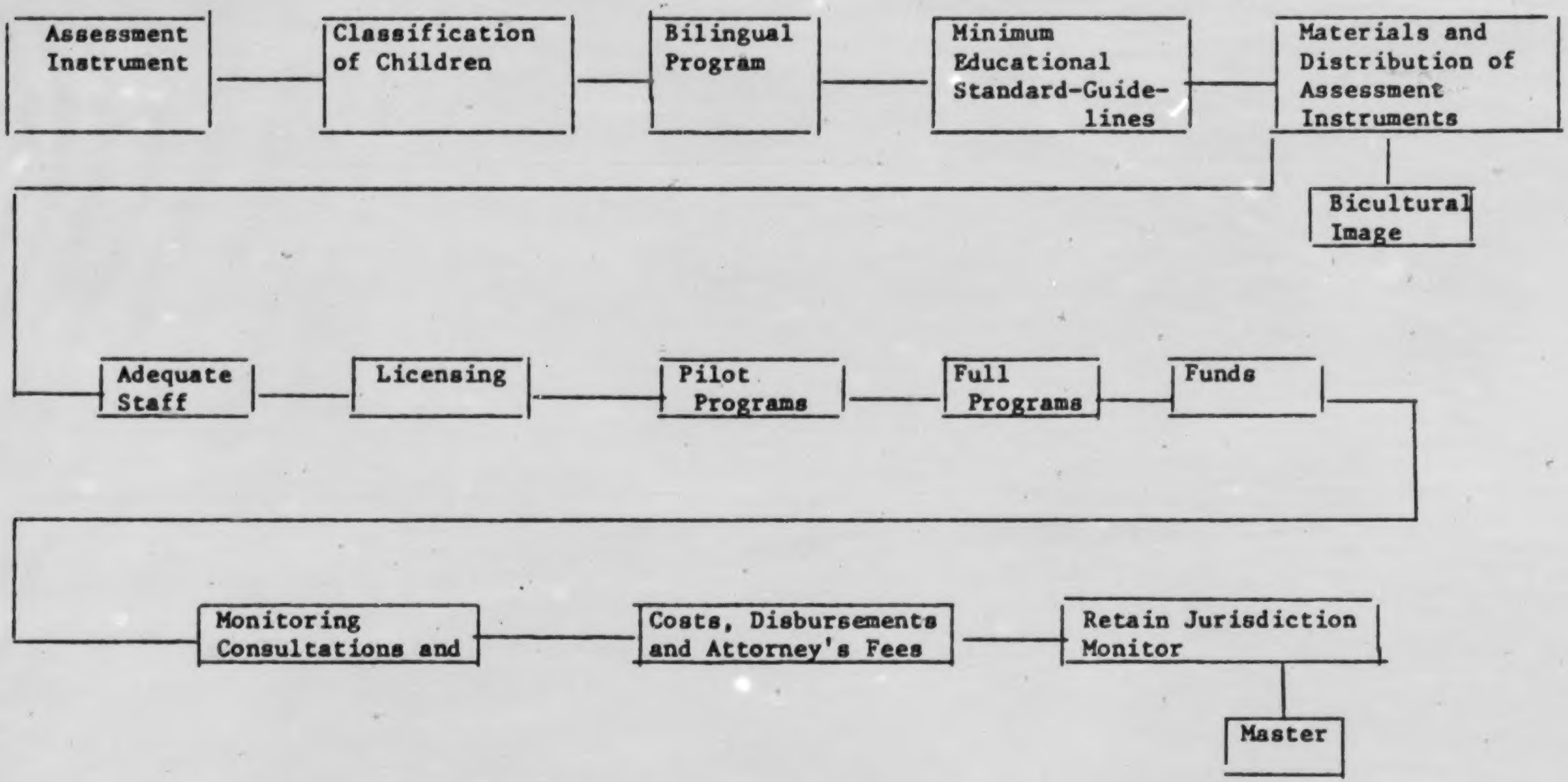
20. How will my involvement in the lawsuit affect my independence as a teacher and educator?

THE PROCESS

THE LITIGATION PROCESS


Client Contacts Attorney
Preliminary Investigation
Decision to file or not
Selection of Named Plaintiffs
File Complaint
El Vacio-Motion Practice and Discovery
Pre-trial Stage
Trial
Decision
Relief
Attorney's Fee
Settlement
Relief
Attorney's Fee

CONSENT DECREE: IMPLEMENTATION PROCESS/CONSIDERATIONS


Assessment Instrument
Classification of Children
Bilingual Program
Minimum Educational Standard-Guidelines
Materials and Distribution of Assessment Instruments
Bicultural Image
Adequate Staff
Licensing
Pilot Programs
Full Programs
Funds
Monitoring Consultations and
Costs, Disbursements and Attorney's Fees
Retain Jurisdiction Monitor
Master

THE PROCESS:

A Case Study of a Bilingual Lawsuit:

EL CONCILIO DE PADRES, INC. V. BARRIO HAVEN BOARD OF EDUCATION

77 Civ. 104 (D. Conn. Sept. 23, 1977).

Introduction to Case Study

In the case study which follows we have attempted to portray, as realistically as possible, the development of a bilingual-bicultural lawsuit. We have tried to make the characters true to life, including their roles, dialogue and ethnic backgrounds.

In general, the initial proponents for the implementation of bilingual education are community organization leaders, or teachers employed by the school system under attack. The parents and children who are most affected by the outcome of the lawsuit usually remain in the background.

If it is not clear from the case study, it should be pointed out that there is almost always opposition to bilingual-bicultural education. Opposition to bilingual education is not the central message of this case study. Nor is it the purpose of this case study to create stereotypes, although, with a few exceptions, certain character types commonly play a role in bilingual education lawsuits. The sole purpose of this case study is to create a picture so that the reader can see in action the different characters (lawyers, teachers, clients, community organizations, etc.) and events which play a part in the development of a bilingual-bicultural education lawsuit. Hopefully, the case study will be helpful to teachers, parents and community groups who are contemplating litigation in this area.

Barrio Haven, Connecticut, a town of 100,000, experienced an influx of Puerto Ricans and other Hispanics in the 1960's. In 1976, Puerto Ricans and other Hispanics constituted five percent of the town's population and eight percent of the 25,000 students enrolled in the Barrio Haven school system. The 2000 Puerto Rican and other Hispanic students are distributed as follows: 1300 are in elementary school, 600 attend the middle school, and 100 are in high school. In the last five years, only ten Puerto Rican students have graduated from the Barrio Haven High School. The dropout rate among Puerto Ricans is sixty-five percent. The average Puerto Rican student is reading four grades below grade level, thus, by the eighth grade the Puerto Rican student is barely reading the the fourth grade level. Their absenteeism rate is among the highest in the town. Most young, working-age Puerto Ricans are unemployed, having an unemployment rate of nearly sixty percent, in contrast to the twenty percent unemployment rate for other young adults.

In 1974, the Barrio Haven public school system submitted a proposal to HEW for funding of a bilingual education program under Title VII of the Bilingual Education Act. HEW granted the Barrio Haven school system sufficient funds to implement bilingual programs in three of its twelve elementary schools in grades kindergarten (K) through third, in keeping with the school district's proposal. The school also created, in grades three through six, in five schools, English-as-a-Second Language[11] programs in which students are taken out of the classroom for an hour each day to receive instruction in English. While they are out of the classroom, they tend to fall behind in their regular classwork, and there is no rapid improvement in their English ability. No other programs were established by the school system in the four middle schools and the two high schools. In 1976, one of the high school teachers received permission to teach a Puerto Rican culture calss in the high school's mini school program.

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[11] A method of instruction wherein all subjects are taught in English. Non-English speaking students attend the same classes as those who are proficient in English. In a separate subject or course, non-English speakers are taught English.

El Concilio de Padres, Inc. (hereafter "El Concilio") is a group of Puerto Rican and other Hispanic parents and community activists in Barrio Haven. It was founded in 1973 as a community action group, to work in the areas of housing, education, employment and welfare. Hector Martínez and Lucy Rodríguez are the leaders and spokespersons for El Concilio. El Concilio has been very active in the area of bilingual education. Its members have met several times with Dr. Alfredo Torres, the coordinator of the Barrio Haven bilingual education program. El Concilio members have informed Dr. Torres of the community's desire to have the bilingual education program extended from the present K to third to K to sixth, and to have bilingual education implemented in the middle schools and the two high schools. Among the other suggestions made to Dr. Torres were the need for more bilingual teachers and for the discontinuance of the school system's emphasis on English-as-a-Second Language. Dr. Torres' position is that the existing programs are more than adequate to meet the needs of all Puerto Rican and other Hispanic children who cannot effectively function in English; and, that the school system will maintain an emphasis on English-as-a-Second Language as a main tool for teaching children the English language. At the last meeting with Dr. Torres, Hector Martínez pointed out that only 180 students are in bilingual programs and about 250 children are enrolled in the English-as-a-Second Language program. Moreover, he said that there are about 900 children who find it extremely difficult to function in an English-only curriculum, and another 200 who could benefit from bilingual instruction. Lucy Rodríguez added that there is no way of knowing all the children who are in need of bilingual education, because there is no test or procedure available that can measure the exact language deficiency of each student. At that same meeting, Dr. Torres stated that the teachers can determine which students need special instruction by listening to the students and that no sophisticated procedures are necessary. In addition, he said that there are no funds for hiring additional teachers or for expanding the existing bilingual programs.

At a meeting at the headquarters of El Concilio, Hector and Lucy gave a report to the entire group on their meetings with Dr. Torres. Carmen Machado, a bilingual teacher at Oceanside Elementary School, suggests that the group consider litigation as an avenue for obtaining the needed bilingual programs. She had attended a bilingual conference in New York where she participated in a workshop where various methods of obtaining bilingual programs from recalcitrant school boards and administrators were discussed. She informs the group that lawsuits have been brought throughout the country by community groups which have been confronted with a similar problem. After further discussion, Hector suggests to the group that he could consult with an attorney friend at Barrio Haven Legal Services (hereafter "Legal Services") who had helped the community in the past. A motion was passed authorizing

Hector and Lucy to meet with the lawyer and to come back to the group to report on his recommendation.

Later that week, Hector and Lucy meet with Bill Michaels, managing attorney of Legal Services. They discuss the problem of non-English speaking children in the Barrio Haven schools and the possibilities of bringing a lawsuit against the school system to obtain bilingual education. Bill informs them that the Legal Services office has never done any bilingual education lawsuits, but that he knows of a group in Chicago Illinois that has brought many suits of this kind. He also tells them that he is willing to cooperate in any bilingual education lawsuit that is brought in Barrio Haven. Bill then tells Hector and Lucy to contact María Valcárcel, the executive director of the Hispanic American Legal Defense & Education Fund, Inc. (hereafter "Legal Defense Fund") in Chicago. Hector calls the Legal Defense Fund from the Legal Services office and speaks with Ms. Valcárcel.

Hector explains to Ms. Valcárcel the problems affecting Puerto Rican school children in Barrio Haven and summarizes the conversations he has had with Dr. Torres over the past two years. Ms. Valcárcel responds by saying that the Legal Defense Fund might be interested in pursuing the matter, but that she would like to have Hector state the matter again to John Jacobs, the legal director of the Legal Defense Fund. In a conference call to Ms. Valcárcel and Mr. Jacobs later that afternoon, Hector describes the plight of Hispanic children attending the Barrio Haven public schools and the type of program the Hispanic community wants in the schools. Mr. Jacobs indicates that he is interested, but cannot make a commitment at this moment. He recommends to Ms. Valcárcel that one of the Legal Defense Fund attorneys be sent to meet with Hector and the community to see what kind of support there is for a lawsuit and to discuss the matter at length. Ms. Valcárcel agrees to send Miguel Sánchez, one of the Legal Defense Fund attorneys, to meet with Hector and members of the community. Ms. Valcárcel also indicates to Hector that he should have Bill Michaels available to speak to Mr. Sánchez regarding the possibility of having Legal Services participate in the lawsuit as local counsel.

Two weeks later, Mr. Sánchez arrives in Connecticut and is taken to meet the members of El Concilio at their store-front headquarters. At this meeting, the leaders of three other community organizations are present. Mr. Sánchez asks about the position of the Black community on bilingual education, and he wants to know if Hispanic community organizations that are not present at the meeting would support a suit of this nature. He also wants to know if there are any administrators or teachers from within the school system who are willing to work with the attorneys on the lawsuit or who might be sympathetic to the aims of the lawsuit.

One of the community representatives responds that while the Blacks in the community agree in principle with the concept of bilingual education, they are somewhat concerned about the effect that a suit of this nature would have on a desegregation suit they are contemplating, since bilingual education requires the clustering of students and desegregation calls for the dispersal of students. Mr. Sánchez replies that a bilingual lawsuit would not conflict with a desegregation suit if all the groups in question work closely together. Another participant points out that two community organizations not represented at the meeting, while sympathetic to the movement for bilingual education, do not want to become involved in a lawsuit, especially since they are funded by government agencies. Hector points out that one Hispanic organization opposes bilingual education. It is that organization's position that the present programs are sufficient to meet the needs of the community and that English-as-a-Second Language is to be preferred over bilingual education.

Carmen Machado, indicates that she and two other teachers would be willing to become involved in whatever way they can to help the lawsuit. Mr. Sánchez then asks Bill Michaels what role the Legal Services could play in the lawsuit. Mr. Michaels says that his agency is willing to participate in the lawsuit in whatever way the Legal Defense Fund desires. Mr. Sánchez informs Mr. Michaels of a new regulation that prohibits legal services agencies from participating in some civil rights suits, including desegregation. Mr. Michaels answers that it is his interpretation of the ruling that bilingual suits are not included in the category of prohibited activities. Mr. Sánchez then turns to Hector and asks him about the availability of parents and children who cannot effectively function in the English-only curriculum who would be willing to participate in the lawsuit as plaintiffs. Hector says that there is a group of parents more than willing to participate. In fact, some are present at the meeting and brought their children along. Mr. Sánchez meets with some of these parents and finds that they speak only Spanish and that their children speak primarily Spanish.

Before the meeting is adjourned, Mr. Sánchez informs the group that he has to go back to the Legal Defense Fund with the information he has gathered and report to his colleagues, whereupon a decision will be made on whether the Legal Defense Fund will bring the suit. He says that he will convey an answer to Hector in two weeks.

At a meeting of the Legal Defense Fund staff attended by the eight Legal Defense Fund lawyers, two of whom are Hispanics, Mr. Sánchez reports on the problems of Hispanics who live in Barrio Haven. He indicates that Barrio Haven is a young community, with disastrous educational problems, that it is a community which has begun to organize, especially around education issues. He indicates that El Concilio appears to be the proper organization to work with. It has a strong leadership and is well respected in the community. He adds that Legal Services is willing to serve as local counsel and will cover some of the expenses incurred in the lawsuit. He notes that Hector Mártínez appears to be the dynamic type of community leader who would see a lawsuit through to its end and who would keep the Hispanic community mobilized around a lawsuit. After further discussion on the impact of the school system's present practices with respect to Hispanics, it is decided by the staff to file suit. The executive director concurs in the decision. The legal director appoints Mr. Sánchez and David Edwards to handle the suit.

Mr. Sánchez drafts a letter to be sent to Hector. He outlines in the letter that El Concilio must hold a special meeting where they are to vote on a resolution retaining the Hispanic-American Legal Defense & Education Fund as the attorneys for the organization for the purpose of bringing a bilingual education lawsuit against the Barrio Haven Board of Education. Mr. Sánchez also mentions in the letter that Hector must get the parents who have children who cannot effectively learn in the English-only school curriculum to sign retainers, which will authorize the attorneys to bring suit on behalf of the parents and their children. Mr. Sánchez suggests that Hector find at least ten such parents with children in the public school system. He advises Hector that these parents will represent all parents with children in the school system who are in a similar predicament. He also indicates that affidavits will have to be prepared for each child, setting forth the specific problems which each child has in attempting to function in the school system as it is presently constituted and how this situation affects his/her school work. It is Hector's task to coordinate the acquisition of all this information and to relay it to the Legal Defense Fund. Upon receiving this information, the Legal Defense Fund will be prepared to file suit.

Hector receives the letter and gets in contact with the three teachers who had volunteered to assist in the lawsuit. The teachers agree to single out Spanish-speaking students having difficulties in the English-only curriculum and who are either in English-as-a-Second

Language programs or who are receiving no help whatsoever. After a list of these students is compiled, Hector and the teachers go out into the community to meet with these students and their parents. It is from this group that the final list of plaintiffs will be drawn. Hector also coordinates the collection of the parents' signatures on the retainers, together with the affidavits required by the attorneys.

Once this plaintiff search is over, the retainers and affidavits are forwarded to the Legal Defense Fund, where a complaint is drafted. The complaint lists the named plaintiffs in the lawsuit, which include El Concilio and the parents of the school children who cannot function effectively in the English-only curriculum, along with their children. The complaint also describes the situation which these students find themselves in; that the school board's failure to remedy this situation creates a violation of law; and that these plaintiffs are entitled to relief against the school board, i.e., bilingual education, as well as any other relief the court may deem appropriate, including attorneys' fees. Once the complaint is drafted in final form, it is filed with the Clerk of the Federal District Court in Connecticut. The Clerk gives the complaint a civil action number and assigns a judge to hear the case. At this point, the legal action against the Barrio Haven Board of Education has commenced. The defendant school board must now answer the complaint.

On the day that the complaint is filed, El Concilio will schedule a news conference to announce to the community that the lawsuit has been filed. This will help to gain support and to mobilize people around the lawsuit and to put the school board on the defensive.

THE PROCESS: The Complaint

Introduction to The Complaint

In this section we present an actual Complaint that was filed using the facts presented in the Case Study. On the right side of each page we have attempted to explain, in simple language, each section of the Complaint.

The Complaint is the document submitted by the plaintiffs to the court, which initiates the lawsuit and which sets forth the actions or failures to act of the defendants which the plaintiffs claim have led to a violation of their rights. It also tells the court what remedies the plaintiffs seek in order to correct the situation.

In other sections of this document we have stated that most, if not all, federal and state laws which were passed to facilitate, encourage, or mandate the implementation of bilingual education programs.are compensatory in nature. That is, their intent is to compensate, make up for, or relieve the "problems" that non-English speaking school children have. Likewise, programs implemented as a result of legal actions are also compensatory. One of the main reasons for this is that in almost all documents submitted to the court by the attorneys for the plaintiffs, including the Complaint we present here, the plaintiff school children, as well as the members of the class they represent, are referred to as having "difficulties," "problems," "deficiencies," or as "educationally deprived." It follows that a court presented with a situation where school children are pictured in this manner, will favor and endorse a program designed to "correct" their "inadequacies" by requiring that they learn English as fast as possible.

One cannot expect a court to order that a program be implemented which insures that the language and culture which the children bring to the school be maintained, or their use be encouraged for any prolonged period, since the court has been informed by the plaintiffs themselves, that knowledge of this language and possession of this culture, along with a lack of knowledge of the English language, are what created the "problem." Although some may contend that the kinds of programs that a court can order are limited by law, that is arguable since the real limits of the law in this area have not been tested.

Documents submitted to the court on behalf of the plaintiffs should not contain the language we have referred to. In addition, the court should be informed that learning English by itself may not be the solution. It is argued by some that if retention of the students' native language and culture are encouraged in schools, and these languages and cultures are pictured in a positive light by teachers and school officials, these students will tend to feel better about themselves and consequently, will do better in school. In the Epilogue to this document we offer some additional suggestions for taking bilingual education out of the compensatory framework.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

EL CONCILIO DE PADRES, INC., on behalf of themselves and all other persons similarly situated,

OLGA MORALES, individually and on behalf of her children LOURDES MORALES, LUIS MORALES and DAVID MORALES,

MANUEL COLON, individually and on behalf of EDUARDO COLON, RICARDO COLON and ORLANDO COLON,

LYDIA VELAZQUEZ, individually and on behalf of her children JEANETTE VELAZQUEZ, ARNALDO VELAZQUEZ and JOSE VELAZQUEZ,

Plaintiffs,

77. Civ. 104

COMPLAINT

CLASS ACTION

- against -

SAMUEL A. CARTER, as Superintendent of Schools for the Barrio Haven School District, GERALD GALATI, as President of the Board of Education for the Barrio Haven School District, and JOHN DONAHUE, THOMAS MATTHEWS, JACQUELINE SAINT-CLAIRE, KAL LEWIS, DANIEL GERASSI, GEORGE L. ROSSI, as members of the Board of Education of the Barrio Haven School District, individually and in their official capacities,

Defendants.

NOTES ON CAPTION TO THE COMPLAINT

1. The caption to the Complaint provides basic information regarding the parties to the lawsuit, the location of the court in which the lawsuit is being brought, and the type of complaint that is being filed.

2. In the present case, this lawsuit is being brought in the United States District Court for the District of Connecticut. Moreover, the plaintiffs to the lawsuit consist of El Concilio de Padres, Inc. (El Concilio) and various parents on behalf of their children. The lawsuit is against the Superintendent of the Schools of the Barrio Haven School District and the members of the Board of Education of the District.

3. The file number 77 Civ. 104 refers to the fact that the lawsuit was brought in the 1977 calendar year, that it is a civil, rather than a criminal lawsuit and that it has been assigned the case number 104 by the court. Finally, this document is a "Complaint" and is being brought as a "class action."

PRELIMINARY STATEMENT

1. This action is brought on behalf of the Puerto Rican and other Hispanic school children to redress and enjoin defendant school officials' violations of plaintiffs' right to an equal educational opportunity as guaranteed by the Fourteenth Amendment to the Constitution of the United States, Title VI of the Civil Rights Act of 1964 and the Equal Educational Opportunity Act of 1972. Defendant school officials fail to provide plaintiff children, who have English language deficiencies, with programs, curricula, and personnel necessary to ensure their equal and effective participation in the educational process. As a result of defendant school officials' unlawful practices, plaintiff children are discriminated against on the basis of their ethnicity and national origin.

NOTES ON THE PRELIMINARY STATEMENT

A. The preliminary statement in the Complaint is the first opportunity the court has to learn in summary fashion why this lawsuit is being brought and on what laws the plaintiffs are basing the lawsuit. In this statement, the plaintiffs have informed the court that this action is brought on behalf of Puerto Rican and other Hispanic school children. The harm complained of is the violation of the rights of plaintiffs to an equal educational opportunity. The plaintiffs claim that the rights of the plaintiffs are guaranteed by the Fourteenth Amendment to the Constitution of the United States, Title VI of the Civil Rights Act of 1964 and the Equal Educational Opportunity Act of 1972.

B. Once the court is apprised of the basic allegations and laws securing the plaintiffs' rights, the plaintiffs have outlined what it is the defendant school officials have done or failed to do to them. The school officials are alleged to have failed to provide to Puerto Rican and other Hispanic school children, who have English language deficiencies, equal and effective participation in the educational process of the Barrio Haven schools. They have done this by failing to provide Puerto Rican and other Hispanic school children with programs, curricula and personnel that would guarantee equal and effective participation. Finally, the plaintiffs tie this denial of services to their ethnicity and national origin. The reason for this is that "ethnicity" and "national-origin" relate to the specific purposes of the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964 and the Equal Educational Opportunity Act.

C. The Fourteenth Amendment to the Constitution of the United States provides that: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law." This Amendment, adopted in 1868, after the Civil War, impinges upon traditional state roles, such as education, and requires that all persons affected by state action be afforded "equal protection" of the law. Since one of the purposes behind the Fourteenth Amendment was to insure equal rights to the newly-freed slaves, the Amendment has been interpreted to afford protection to persons of racial and national origin backgrounds. Indeed, classifications such as race and national origin** have been deemed by the Supreme Court of the United States to be "suspect classifications, requiring a compelling state interest to be allowed.*** In the Complaint's preliminary statement the plaintiffs took pains to mention that the effect of the actions of the school board officials was to discriminate against Puerto Rican and other Hispanic children on the basis of their ethnicity and national origin. The point of making this allegation is to bring the harm suffered by the plaintiffs within the scope of the Fourteenth Amendment and thus raise a primary federal right.

D. Title VI of the Civil Rights Act was passed in 1964 in order to

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** Designated by the state and its subdivisions or agencies, which exclude these groups from programs or deny them certain benefits.

*** This means that the state must show a very important need or reason to make the classification.

eliminate the effects of discrimination on Blacks and national origin minorities. The purpose behind the statute was to prevent persons, schools districts, states and others receiving federal funds, from discriminating on the basis of race, color or national origin.

That statute provides that:

> No person in the United States shall, on the ground of race, color or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.
>
> Pub. L. 88-352, Title VI, 601, July 2, 1964, 78 Stat. 252.

Hence, there can be no exclusion from participation in, or denying the benefits of, or discriminating on the grounds of race, color or national origin in any federally assisted program. With the inception of federal aid to states and school districts, this statute has taken added weight because it has placed liability on school districts, such as Barrio Haven, that receive federal funds, for the impact of their actions on minorities, despite the fact that discrimination might not have been intended. Indeed, "substantial impact" alone triggers the protections of the statute. This parallels the protection afforded by the Fourteenth Amendment. However, exactly what "substantial impact" means is unclear.

The test under title VI of the Civil Rights Act is whether the neutral policies of a recipient of federal funds have a discriminatory impact (whether intended or not is irrelevant) upon identifiable minority groups, such as Blacks, Hispanics, Native Americans and others. If there is such impact, then, as in the case with the Fourteenth Amendment, the school district must show a compelling state interest to justify the discrimination. (It is not sufficient for the school district to show a rationally related interest or a legitimate state interest, since the highest standard of scrutiny is always imposed by the court where the discrimination is based on race and/or national origin.)

E. The purposes and provisions of Title VI of the Civil Rights Act are also implemented by each federal department and agency empowered to extend federal financial assistance to any program or activity. In this instance, pursuant to section 602 of Title VI, 42 U.S.C. 2000d-1, the Department of Health, Education and Welfare (HEW), which provides federal assistance to school districts, such as Barrio Haven, has issued rules which are binding on the school district and which seek to effectuate the requirements of Title VI. These rules are part of the conditions upon which such funds are awarded to school boards. The Supreme Court has held that the regulations issued by HEW regarding national origin-minority school children who cannot effectively function in an English-only school curriculum are proper and school boards receiving federal assistance must abide by them. See _Lau_ v. _Nichols_, 414 U.S. 563 (1974).

HEW issued regulations which specify that recipients of federal financial assistance may not:

> "(ii) Provide any service, financial aid, or other benefit to an individual which is different, or is provided in a different manner, from that provided to others under the program.
>
> . . . .
>
> "(iv) Restrict an individual in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any service, financial aid or other benefit under the program."

> Discrimination among students on account of race or national origin that is prohibited includes "discrimination...in the availability or use of any academic...or other facilities of the grantee or other recipient." Id., 80.5(b)

Moreover, a recipient of federal funds "may not...utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination" or "have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin." These regulations are therefore effect oriented, regardless of whether the effect may have been intended or not.

In 1970, HEW issued further guidelines pursuant to its powers under section 602 of Title VI of the Civil Rights Act, which include the following language:

> Where inability to speak and understand the English language excludes national origin-minority group children from effective participation in the educational program offered by a school district, the district must take affirmative steps to rectify the language deficiency in order to open its instructional program to these students.
>
> An ability grouping or tracking system employed by the school system to deal with the special language skill needs of national origin-minority group children must be designed to meet such language skill needs as soon as possible and must not operate as an educational dead end or permanent track.

Accordingly, by contractually agreeing to "comply with Title VI of the Civil Rights Act of 1964...and all requirements imposed by or pursuant to the Regulation" of HEW (45 Code of Federal Regulations Part 80) which are "issued pursuant to that title" and to "take any measures necessary to effectuate this agreement," the Barrio Haven School District has agreed not to fail to do anything which would have the effect of excluding national origin-minority group children from effectively participating in the District's educational program. Put differently, since it receives federal funds, the School District is to be held liable for any policies which have the effect of excluding Puerto Rican and other Hispanic children from equally participating in the school program.

The Act also declares the denial of equal educational opportunity to be an unlawful practice. In a relevant part, the Act provides at 20 United States Code 1703(f) as follows:

> (f) the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs.
>
> Pub. L. 93-380, Title II, § 204, Aug. 21, 1974, 88 Stat. 515.

Thus, the defendant School District is liable to the plaintiffs if the plaintiffs can show that the defendant has failed to take whatever steps may be appropriate and necessary for Puerto Rican and other Hispanic children to function effectively in the schools.

C. In summary, in the preliminary statement the plaintiffs have already informed the court that the basis for the plaintiffs' legal claims are derived from the Fourteenth Amendment, Title VI and the guidelines and regulations issued thereunder, and the Equal Educational

Opportunity Act. They have informed the court that the plaintiffs meet the national origin criteria of these statutes and that the plaintiffs are being discriminated against because of their inability to function effectively in the English-only schools, which discrimination is prohibited by the above statutes. Finally, they have asserted that the defendant School District has an affirmative obligation to take necessary steps to accord the plaintiffs an equal educational opportunity by designing programs and methods which will insure their equal participation.

2. Jurisdiction is conferred on this Court by 28 U.S.C. 1343 (3) and (4) in that this is an action to secure equitable relief under 42 U.S.C. 1983. Declaratory relief is authorized by 23 U.S.C. 2201-2202 and Rule 57 of the Federal Rules of Civil Procedure, which relate to declaratory judgments.

NOTES ON JURISDICTION

A. Jurisdiction is the power of a court to hear a particular case and to exercise its authority over the parties. The federal courts are courts of limited jurisdiction. This means that they may hear only those cases which arise under the Constitution of the United States, and the laws and the treaties made under the authority of the United States. The jurisdiction clause in the Complaint tells the court that it has the power to hear the case brought by El Concilio, pursuant to two sections of one statute.[12]

For the plaintiffs to make out their claim that the Federal District Court of Connecticut has the power to hear their case, they must have alleged that they have been deprived, by some state action or inaction, of federal rights guaranteed by the Constitution of the United States or by an Act of Congress. We have seen that in this regard the plaintiffs have already alleged that they have been deprived by the School District of rights guaranteed by the Fourteenth Amendment, by Title VI of the Civil Rights Act of 1964 and the regulations promulgated pursuant to Title VI, and by the Equal Educational Opportunity Act of 1974.

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[12] The statute used by the plaintiffs to allege jurisdiction is found at 28 U.S.C. Section 1343 (3) and (4):

> § 1343. Civil rights and elective franchise
>
> The district court shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;
>
> (4) To recover damages or to secure equitable or other relief under any Act of Congress providing for protection of civil rights, including the right to vote. June 25, 1948, c. 646, 62 Stat. 932; Sept. 3, 1954, c. 1263, § 42, 68 Stat. 1241; Sept. 9, 1957, Pub. L. 85-315, Part III, § 121, 71 Stat. 637.

One other statute which the plaintiffs allege the defendants have violated is the Civil Rights Act of 1861.[13] That law prohibits any person or body, such as the Barrio Haven School District which acts under state law, from denying a citizen of the United States, such as the plaintiffs here, those rights guaranteed by the Constitution and laws of the United States. Where this happens those persons who violate these rights can be held accountable in a court of law. This particular statute is the basic civil rights law used in almost every major civil rights litigation involving an allegation of violation of federal rights by state action or inaction.

Jurisdiction is also properly met here because the plaintiffs are requesting injunctive relief. Injunctive or equitable relief is simply the power of a court to weigh the rights of either side in an action and to award relief from harm or from the plaintiffs' claim of harm to the side which shows itself entitled to a decision in its favor based on what is fair and proper.

B. The plaintiffs in this action are also asking the court to

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[13] The Civil Rights Act of 1861 is also known as 42 U.S.C. Section 1983 and provides:

> § 1983. Civil action for deprivation of rights
>
> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action of law, suit in equity, or other proper proceeding for redress.
>
> R.S. § 1979.

issue a declaration of their rights pursuant to two statutes.[14] These statutes allow the court to declare the rights of parties seeking such declaration and to grant whatever relief is necessary or proper. These two statutes then grant the power to hear the plaintiffs' petition for a declaration of their rights as against the defendants.

C. Finally, the plaintiffs have cited a federal rule[15] which tells the court that it has the power to order a speedy hearing for a declaration of rights and to issue a declaration of rights despite the fact that there might be other remedies available to the plaintiffs. This suggests to the court that this lawsuit should be given special and careful attention.

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[14] The two statutes that provide for a declaration of rights are 28 U.S.C. 2201 and 2202:

> § 2201. Creation of remedy
>
> In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such. June 25, 1948, c. 646, 62 Stat. 964; May 24, 1949, c. 139, § 111, 63 Stat. 105; Aug. 28, 1954, c. 1033, 68 Stat. 890; July 7, 1958, Pub. L. 85-508, § 12(p), 72 Stat. 349.
>
> § 2202. Further relief
>
> Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment. June 25, 1948, c. 646, 62 Stat. 964.

[15] The rule regarding a declaration of rights is Rule 57 of the Federal Rules of Civil Procedure which provides that:

> Rule 57.
>
> The procedure for obtaining a declaratory judgment pursuant to Title 28 U.S.C. § 2201, shall be in accordance with these rules, and the right to trial by jury

PLAINTIFFS

3. The individual plaintiffs are Puerto Rican and other Hispanic public school children and their parents who are their representatives. They are residents of the town of Barrio Haven, Connecticut, and each child attends a public school in the Barrio Haven School District. Each individual plaintiff is Spanish dominant, as Spanish is the language of his home. They all have English language deficiencies and thereby are prevented from equally and effectively participating in the English-only education program of the schools which they attend. None of the children receive effective and appropriate programs to insure their equal and effective participation in the educational process. Each child is educationally deprived and needs special educational assistance.

4. EL CONCILIO DE PADRES, INC. (hereinafter, "EL CONCILIO") is a non-profit corporation dedicated to improving the legal, social, political and educational status of the parents of children in the Barrio Haven Public Schools. Accordingly, EL CONCILIO is dedicated to developing the intellectual and creative capacity of the Puerto Rican and other Hispanic parents and children residing in Barrio Haven, many of whom are members of EL CONCILIO and whose children cannot properly function in an all English educational environment. In that connection, it seeks to improve the educational circumstances of Puerto Rican and other Hispanic students attending the Barrio Haven School District.

5. OLGA MORALES, and her children, LOURDES MORALES, age nine (9), LUIS MORALES, age thirteen (13), and DAVID MORALES, age fourteen (14), reside in Barrio Haven. LOURDES attends the Bedford Avenue School in the

NOTES ON PLAINTIFFS

A. In this section, the plaintiffs will give the court and the defendants a description of who they are and on what they are basing their claims for relief. In effect, this paragraph describes the harm suffered by the plaintiffs and seeks to alert the court that, based on the facts described, the plaintiffs have standing to raise the issues that are now before the court. You will note that the individual plaintiffs are described on the basis of: their attendance in the public schools of Barrio Haven; their national origin; and as residents of the town. The parents sue on behalf of their children. The basic problem is then addressed: the Spanish dominance of the individual plaintiffs and their English language "deficiencies," all of which prevent these children from participating "equally and effectively" in the School District's educational program. You should remember that "equal and effective" participation relates to the terms used in the HEW regulations and the Equal Educational Opportunity Act of 1972.

Finally, the paragraph ends with a conclusory statement that these children need special educational assistance because of the educational deprivation they have suffered.

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15 (cont'd)

may be demanded under the circumstances and in the manner provided in Rules 38 and 39. The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The court may order a speedy hearing of an action for declaratory judgment and may advance it on the calendar. As amended Dec. 29, 1948, eff. Oct. 20, 1949.

Barrio Haven School District. LUIS and DAVID attend the West Haven Middle School in the Barrio Haven School District. No effective program is offered to LUIS and DAVID to teach them in a language they understand so as to ensure their equal and effective participation in the educational process and to teach them English. LOURDES received one and one-half hours a week of instruction in English-as-a-Second Language when she was seven years old, but no effective program has been offered to her since that time to ensure her equal and effective participation in the educational program, and to teach her English. LOURDES, LUIS and DAVID have each been left back at least once.

6. MANUEL COLON and his children, EDUARDO COLON, age ten (10), RICARDO COLON, age twelve (12), and ORLANDO COLON, age fourteen (14), reside in Barrio Haven. EDUARDO attends the Bedford Avenue School in the Barrio Haven School District. RICARDO and ORLANDO attend the West Haven Middle School in the Barrio Haven School District. No effective program is offered to RICARDO and ORLANDO to teach them in a language they understand so as to insure their equal and effective participation in the educational process and to teach them English. EDUARDO receives special language instruction for one and one-half hours of each school day, but such instruction is inadequate to insure his equal and effective participation in the educational program and to teach him English. RICARDO and ORLANDO are both reading two grades below level.

7. LYDIA VELAZQUEZ and her children, JEANETTE VELAZQUEZ, age fourteen (14), ARNALDO VELAZQUEZ, age twelve (12), and JOSE VELAZQUEZ, age fifteen (15) all reside in Barrio Haven. JEANETTE, ARNALDO and JOSE all attend the Columbus Middle School in the Barrio Haven School

B. El Concilio de Padres, Inc. is a non-profit corporation organized under the laws of Connecticut. According to its corporate purposes one of the reasons for the corporation's existence is its dedication to the improvement of the status of parents in the Barrio Haven public schools. While it is important to have a purpose of this type in the organization's corporate charter, what is crucial is that it have members who have suffered some type of harm similar to the other individual plaintiffs in the lawsuit. In this case, El Concilio actually does have such members and thus meets the major element of standing, that is, that it has and represents persons who are aggrieved by the defendants' actions or inactions. The failure to have such members, as was the case in *Rios* v. *Read*, ____F.R.D._____ (E.D.N.Y. 1976), would result in the dismissal from the action of El Concilio for failure to have standing. In *Rios* v. *Read*, *supra*, the organizational plaintiff, La Unión Hispánica de Suffolk County, Inc., failed to show the court that it had sufficient standing to remain in the lawsuit as it was basically a membership organization interested in civic purposes, but did not have as its constituency persons who had suffered harm as a result of the Patchogue-Medford School District's actions or inactions. Accordingly, the organization was dismissed from further participation in the lawsuit as a named plaintiff.

Thus, the plaintiffs in this lawsuit have very specifically alleged the type of members that it has in order to face and defeat any challenge with respect to its standing to participate in the lawsuit.

C. Olga Morales is the parent of Lourdes, Luis and David Morales, all of whom attend the Barrio Haven public schools and all of

District where JOSE was placed one grade lower than that appropriate for his age level when he entered the school in September, 1975. JEANETTE, ARNALDO and JOSE receive special group instruction two days a week, but such instruction is inadequate to insure their equal and effective participation in the educational program, and to teach them English.

whom are harmed or affected by the defendants' actions or inactions. More specifically, the names of the school are identified and the types of programs, if any, in which the students are enrolled and which are inadequate to deal with the plight of these children are also singled out. The plaintiffs have thus made an allegation of the harm they are suffering and have indicated that whatever programs are offered to them do not meet the requirement of the law, which is to insure their "equal and effective" participation in the School District's educational program. The allegations of Manuel Colón and his children, together with Lydia Velázquez and her children, also follow the same pattern as that of Olga Morales, each of them explaining and identifying who they are and the nature of the harm they are suffering.

DEFENDANTS

8. SAMUEL A. CARTER is the Superintendent of Schools for the Barrio Haven School District in the Town of Barrio Haven, and as such he is the chief administrative officer and the chief instructional officer of the Board of Education and the School District. He acts subject to the policies of the Board. He is responsible for the execution of all actions of the Board, the administration and operation of the public school system, and the supervision of instructions.

9. GERALD GALATI is the president and JOHN DONAHUE, THOMAS MATTHEWS, JACQUELINE SAINT-CLAIRE, KAL LEWIS, DANIEL GERASSI and GEORGE ROSSI are members of the Board of Education for the Barrio Haven School District in the Town of Barrio Haven. The Board of Education is responsible for operating the Barrio Haven School District, and has the power to promulgate and enforce any and all policies for the Barrio Haven School District.

10. Defendants are sued in their individual and official capacities.

NOTES ON DEFENDANTS

A. The plaintiffs have named those school officials who have the power to correct their immediate situation. These individuals are also responsible, through their policies, for the denial of equal educational opportunity to the plaintiff children. Thus, the court is informed that these individuals are the ones to be held accountable for the acts which are alleged to have a discriminatory impact upon plaintiff children. Finally, the defendants are sued both as individuals and in their official capacities. In this fashion, the court has power over them as individuals and over any of their successors to office. Additionally, this allows the court to avoid any claim of state immunity. As individuals responsible for discriminatory acts which are prohibited by law, Board members are not immune from prosecution.

CLASS ACTION ALLEGATIONS

11. The named plaintiffs bring this action on their own behalf and on behalf of all others similarly situated pursuant to Rule 23(a) and Rule 23(b) (1) (A) and (2) of the Federal Rules of Civil Procedure. The class is comprised of all Puerto Rican and other Hispanic children who attend the public schools in the Barrio Haven School District who by reason of their English language deficiencies are prevented from equally and effectively participating in the learning process, and who receive either no programs to insure such participation, or insufficient, inappropriate or inadequate programs. Plaintiffs and their class are educationally deprived and have need for special educational assistance.

NOTES ON THE CLASS ACTION ALLEGATIONS

A. The class action lawsuit has gained in popularity in recent years. It allows plaintiffs to represent a much larger group of individuals or organizations who are similarly situated, that is, who in fact have common claims and suffer from a common harm. This forces those in a position to correct the problem, to take notice of the depth and dimension of the problem that gave rise to the lawsuit. It also permits the resolution of a massive and complex problem which affects many people, by one lawsuit rather than many.

Class action lawsuits have been used effectively in the environmental field, in the prisoners' rights area, in shareholder lawsuits against companies, and in civil rights litigation. In order for a lawsuit to be deemed a class action, the plaintiffs must present those facts and allegations that show compliance with the class action rule.[16] In order to meet the requirements of the class action rule, the plaintiffs must show to the satisfaction of the court that they are so numerous that they should not be forced to bring their own individual suits, nor should they be forced to simply add as individual parties each and every member of the class. The latter procedure is called "joinder" and means simply the joining into one lawsuit, as plaintiffs or defendants, all individuals who have an interest or stake in the outcome of the case.

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[16] The basic requirements of the class action rule are set out in Rule 23(a) of the Federal Rules of Procedure which is stated below:

> (a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions or law of fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.
> (Rule 23 in its entirety is included herein as Appendix C.)

Thus, if El Concilio represented a class of only ten persons, the court will probably order that El Concilio add or join these other persons in their lawsuit and would deny the motion to make this lawsuit a class action. However, since El Concilio in fact is representing approximately 1530 Hispanic students and each student would be entitled to have a parent bring a lawsuit on his or her behalf, then joinder is less practicable. Class action status, if granted, means that the plaintiffs do not have to add over a thousand more individual plaintiffs with the obligation of serving each of them with copies of every document through the proceedings. The class action under these circumstances would be superior to "joining" all of the parties as individuals in one lawsuit.

The second requirement that must be met before the court can rule a lawsuit to be a class action is that the harm suffered by the named plaintiffs is the same as that purported to be suffered by the other members of the class. The chief issue of concern is whether there are common questions of fact and law which the court can decide and which outweigh any differences that might exist between members of the class. Additionally, it must be shown that the claims made by the named plaintiffs, together with any defenses, are typical of the class.

In the present case, the claims of Puerto Rican and other Hispanic children to receive "equal and effective" education are clearly typical. These same claims offer common questions of law, namely, whether they are entitled to such programs, and, common questions of fact, that is, what programs, if any, are they receiving and what programs, if any, are they entitled to. Finally, the plaintiffs must be able to show the court that they will fairly and adequately protect the interests of the class. This can be shown by demonstrating to the court that the plaintiffs have a big stake in the outcome of the lawsuit and that they are represented by competent attorneys, who will prosecute this action vigorously and to the end.

B. Once the above requirements are met, the plaintiffs must show that they meet one other requirement of the class action rule.[17] In the present lawsuit, the plaintiffs have claimed that they meet that portion of the rule which is designed to prevent individual members of the class from bringing their own lawsuits and thus obtaining different decisions from different judges. The plaintiffs thus allege that if each member of the class they seek to represent is allowed to prosecute a similar lawsuit, the result would be different court decisions from each court hearing the same type of claim. This would lead to incompatible standards since conceivably defendants would have

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[17] In the class action allegations of the plaintiffs, they have stated that they meet Rule 23(b) (1) (A) of the Federal Rules of Civil Procedure, which provides that:

> (b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> (1) the prosecution of separate actions by or against individual members of the class would create risk of
>
> (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

to provide a different remedy for every successful plaintiff who brings a lawsuit. To avoid inconsistent or varying decisions, the plaintiffs argue that they should be allowed to maintain their action as a class action.

C. The plaintiffs have also alleged that they meet the requirements of another section of the class action rule.[18] Should the court not be persuaded by the argument set out in paragraph B above, the plaintiffs have argued that this ground should suffice to make out a class action claim. The plaintiffs argue that the defendants have acted or refused to act in the same manner with respect to all Puerto Rican and other Hispanic children who cannot function effectively in existing school programs. In essence, the plaintiffs argue that defendants have treated all Puerto Rican and ohter Hispanic children in their schools in the same way, that is, by failing to provide them with an equal and effective education. Accordingly, under this segment of the class action rule the court has the power to order that plaintiffs be treated as one group. Secondly, since the plaintiffs have asked the court to declare the rights of the parties to this lawsuit by issuing a declaratory judgment and by seeking an injunction against the practices of the defendants, the plaintiffs have satisfied the other requirement of Rule 23(b) (2).

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[18] The plaintiffs have also alleged that they meet the requirements of Rule 23(b) (2) which provides that:

> (b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole...

Thus to maintain a class action the plaintiffs need only have the court accept the arguments they pose in A above together with B and/or C. Should the court be persuaded that a class action is proper, it will certify the lawsuit as a class action. This will permit the plaintiffs to exercise substantial leverage in any negotiations with the defendant schools. Plaintiffs will be able to point out to the defendants that they no longer represent a few isolated parents and school children, but all school children who might be affected by the defendants' actions or inactions. The pressure that can then be exerted on the defendants to settle the lawsuit is thus increased tremendously.

D. The most significant part of the plaintiffs' class action allegations is contained in paragraph 11 of the Complaint which defines the composition of the class:

> The class is comprised of all Puerto Rican and other Hispanic children who attend the public schools of the Barrio Haven School District who by reason of their English language deficiencies are prevented from equally and effectively participating in the learning process, and who receive either no programs to insure such participation or insufficient, inappropriate or inadequate programs. Plaintiffs and their class are educationally deprived and have need for special educational assistance.

Thus, even though there might be other children in the Barrio Haven School District who because of their English language "deficiencies" do not equally and effectively participate in the learning process, these other children are not entitled to whatever relief is granted by

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the court to Puerto Rican and other Hispanic children. The reason for this is that the court can only award relief to those parties actually before it. In this case, the only parties before the court are the Puerto Rican and other Hispanic children who compose the class certified by the court. Similarly, Puerto Rican and other Hispanic children who have no English language deficiencies do not meet the class definition and are not entitled to any relief that might be awarded by the court in this lawsuit.

It is important to note that included in this lawsuit are Puerto Rican and other Hispanic children who are receiving no programs and those who are receiving some programs, but which are alleged to be insufficient, inadequate or inappropriate. Accordingly, the programs offered by the Barrio Haven School District, whether bilingual education, Engligh-as-a-Second Language or any other, are subject to attack by the plaintiffs. The defendants, on the other hand, will have to show the court that the programs they offer are sufficient, adequate and appropriate to meet the needs of the school children. It is of vital importance that the named plaintiffs discuss with their attorneys all dimensions of the problem so that the definition of the class can be properly drafted.

E. The court will consider the class action question solely on the basis of the arguments set forth in memoranda and briefs submitted by the attorneys; or on the briefs, memoranda and oral arguments; or the matter may be decided after a trial-like proceeding where documents and witnesses are put before the court. The defendants may argue against having the lawsuit certified as a class action; and, they may attempt to have certain individuals, as well as the community organization, dismissed from the lawsuit. They may argue that the latter have no "standing" to bring the lawsuit. That is, that they are not proper parties to be involved in the lawsuit because they are not sufficiently aggrieved or do not have a proper stake in the outcome of the litigation.

12. The class is so numerous that joinder of all members is impracticable. The public schools in the Barrio Haven School District have over 2000 Puerto Rican and other Hispanic students, a substantial number of whom have English language deficiencies. Plaintiffs and their class number among these students. There are questions of law of fact common to all members of the class, to wit: that defendants' practices and policies violate the equal protection clause of the Fourteenth Amendment to the Constitution of the United States and Title VI of the Civil Rights Act of 1964. The claims of the named plaintiffs are typical of the claims of the class in that all plaintiffs allege they are prevented from equally and effectively participating in defendants' educational process by reason of defendants' unlawful practices. The named plaintiffs, represented by experienced counsel, will fairly and adequately protect the interest of the class.

13. The prosecution of separate actions would create a risk of inconsistent adjudications establishing incompatible standards of conduct for defendants. Defendants have acted on grounds generally applicable to the class, thereby making appropriate final injunctive relief, or corresponding declaratory relief, with respect to the class as a whole. Therefore, a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

NOTES ON PARAGRAPHS 12 & 13 OF CLASS ACTION ALLEGATIONS

A. Paragraph 12 seeks to meet the requirements of Rule 23(a) which we have already discussed. It informs the court that joinder is not practicable since there are 2000 Puerto Rican and other Hispanic children in the Barrio Haven School District. The plaintiffs outline for the court the questions of law or fact that they share with the other members of the class: whether or not the defendants' actions and inactions violate the Constitution, Title VI of the Civil Rights and/or Equal Educational Opportunity Acts. Finally, the plaintiffs allege that their claims are typical of the members of the class by reason of the defendants' unlawful practices of denying them equal and effective participation in the learning process and that plaintiffs can and will fairly and adequately protect the interests of the class.

B. Paragraph 13 informs the court that the plaintiffs meet the requirements of both 23(b) (1) (A) and 23(b) (2) of the Federal Rules of Civil Procedure. The plaintiffs argue that separate lawsuits of the class creates a risk of inconsistent decisions resulting in incompatible conduct by the defendants. Also, the plaintiffs claim that the defendants have acted in such a way as to create a basis for either a declaratory judgment or a permanent injunction, thus meeting the requirements of 23(b) (2). The plaintiffs conclude by informing the court that the most efficient and superior mode of litigating this action is via a class action.

FACTUAL ALLEGATIONS

14. Plaintiffs and their class (hereinafter referred to as "plaintiffs"), are mandated by Connecticut state law to attend the public schools of the Barrio Haven School District.

15. Defendants receive and accept federal funds for the maintenance and operation of the public schools of the Barrio Haven School District. As a condition for securing such assistance, the defendants have submitted assurances to the United States Department of Health, Education and Welfare that they are in compliance with Title VI of the Civil Rights Act of 1964 and the federal regulations promulgated thereunder, 45 C F.R. 80.4 (1969). The regulations require that school systems take affirmative action to insure non-discriminatory equal educational opportunity to all students (33 C.F.R. 4955) and that they rectify any language deficiencies that national origin-minority group school children, such as plaintiffs, might have, in order to open instruction to students with such language deficiencies (35 Fed. Reg. 11595).

NOTES ON FACTUAL ALLEGATIONS

A. Factual allegations point out to the court that plaintiffs attend school pursuant to the state compulsory education law. It is an attempt to show the court that plaintiffs are obligated to attend school in the school system and to enroll in the courses it provides, pursuant to Connecticut's compulsory education law. This constitutes sufficient state action to bring into play the Fourteenth Amendment to the Constitution of the United States which prohibits discrimination where state action is involved, and 42 U.S.C. 1983, which prohibits the deprivation of any federal right under color of state law. Paragraph 15 brings this lawsuit within the ambit of Title VI of the Civil Rights Act of 1964. The court is informed that the Barrio Haven School District receives and accepts federal funds. Accordingly, the regulations and guidelines issued by HEW bind the Barrio Haven School District. These regulations and guidelines have already been discussed and require that the School District take affirmative action in dealing with the language barriers of national origin-minority group children.

DEFENDANTS FAILURE TO TAKE EFFECTIVE AFFIRMATIVE STEPS

16. The educational programs and services provided to the plaintiffs in the public schools are conducted predominantly, or in most cases, exclusively in English by instructional and other staff who are overwhelmingly monolingual and unable to read, write, speak or understand Spanish. The materials and texts used in such educational programs and services are predominantly, and, in most cases, written exclusively in English.

17. The schools plaintiffs attend either have (i) no educational programs, services and/or personnel equipped to meet the linguistic needs of these children; or (ii) an insufficient number of such programs, services and/or personnel; or (iii) inadequate or inappropriate educational programs and services. With respect to inadequate or inappropriate programs and services offered by defendants, a substantial number of plaintiffs are not receiving English language instruction and/or if they are offered such instruction, they receive their regular subjects in English only, thereby preventing or impeding them from effectively participating in the learning process.

18. As a result of the foregoing, the plaintiffs are denied the opportunity to equally and effectively participate in the learning process on the same basis as other children in attendance in the public schools of the Barrio Haven School District, and to receive the concomitant economic, social, intellectual and psychological benefits to be gained therefrom.

NOTES ON DEFENDANTS' FAILURE TO TAKE EFFECTIVE AFFIRMATIVE STEPS

Once the plaintiffs have alleged that there is state action in this case and that defendants have an affirmative duty to act properly pursuant to federal statute, regulations and guidelines, they proceed to outline how it is that affirmative steps taken by the defendants, if any, fall short of the constitutional and statutory mandate. Firstly, the school provides Puerto Rican and other Hispanic children who are Spanish dominant with instruction which is almost entirely in English and with materials that are also in English. The children are provided with teachers whom they cannot understand and materials which they cannot read. Secondly, the educational programs accorded to the plaintiff children are not equipped to meet their needs, are not sufficient in number, nor do defendants have sufficient teaching personnel. In short, the instruction is inappropriate or inadequate. The result of these actions and inactions of the defendants is that the plaintiff children do not equally and effectively participate in the Barrio Haven instructional program and fail to receive whatever benefits are supposed to be derived from such instruction.

FAILURE TO ACCURATELY IDENTIFY PUERTO RICAN AND OTHER HISPANIC STUDENTS WITH ENGLISH LANGUAGE DEFICIENCIES

19. Defendants do not have an accurate, systematic method to identify students with English language deficiencies. As a result, the defendants regularly and frequently misclassify the English language ability and achievement of plaintiffs and their class, thereby minimizing the number of students who are classified as having English language deficiencies. The misclassification of these children results in a failure to provide such children programs or services to insure their equal and effective participation in the learning process.

20. Defendants do not have a method to continuously, systematically and accurately evaluate the academic progress, achievement and linguistic levels of plaintiffs. As a result, defendants do not respond to the educational needs of plaintiffs as they do with respect to the English fluent students. Students who are initially recipients of programs and services are, by reason of inaccurate assessment of their academic progress and achievement and their linguistic levels, prematurely transferred from these programs and are denied these services, thereby preventing them from equally and effectively participating in the learning process.

NOTES ON FAILURE TO ACCURATELY IDENTIFY PUERTO RICAN AND OTHER HISPANIC STUDENTS WITH ENGLISH LANGUAGE DEFICIENCIES

One of the problems involved in the Barrio Haven School District was the reliance on teachers to determine whether or not a child needed any special instruction. The failure to provide any scientific assessment of this problem made the results subjective and unreliable. The plaintiffs, therefore, claim that the method of assignment to whatever special programs the School District does have is unsystematic and thereby arbitrary and unreliable. The resulting abuse is the misclassification of children, thus minimizing the number of students eligible for programs. Those children who are placed in the program are prematurely transferred out for the same reason; that is, the failure to use a systematic method of evaluation.

FIRST CLAIM FOR RELIEF

21. By failing to provide plaintiffs and their class with effective educational programs, services and personnel that insure them the opportunity to participate in the learning process on an equal basis as other students, defendants deny plaintiffs the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States.

SECOND CLAIM FOR RELIEF

22. By failing to provide plaintiffs and their class with effective educational programs, services and personnel that insure them the opportunity to effectively participate in the learning process and thereby the opportunity to obtain the education generally obtained by other students, defendants are in violation of Title VI of the Civil Rights Act, 42 U.S.C. 2000d and the regulations promulgated thereunder.

23. Plaintiffs have no adequate remedy at law. Plaintiffs suffer and will continue to suffer irreparable injury unless this Court enjoins the lawful practices described herein.

NOTES ON FIRST & SECOND CLAIMS FOR RELIEF

Paragraph 21:

The plaintiffs have previously outlined the court's jurisdiction to hear the case, singled out the parties to the lawsuit, and the class. The plaintiffs have also set forth their factual allegations, indicating how it is they are harmed by the defendants' practices and policies. Based on these allegations, the plaintiffs make a number of separate claims for relief.[19] In the first claim for relief, they ask the court to find that the defendants' failure to provide effective programs, services and personnel deprives them of their constitutional rights under the Fourteenth Amendment.

Paragraphs 22 & 23:

In their second claim for relief, the plaintiffs allege that the defendants' failure to provide effective programs, services and personnel violates Title VI of the Civil Rights Act and the regulations promulgated pursuant to it. Moreover, such practices and policies violate the Equal Educational Opportunity Act, thus entitling the plaintiffs to relief. Finally, the plaintiffs argue that this is not a lawsuit in which simple money damages can remedy the harm done to them. It is unlike a breach of contract lawsuit where a party might be sufficiently compensated with monetary damages. Instead, this is a suit in equity in which the harm is irreparable and therefore the defendants must be forced to end the harm and to take whatever steps are deemed appropriate to correct it. By claiming that there is no adequate remedy that can be granted to them to correct the harm done here, the plaintiffs are asking the court to use its equitable powers (the power to effect justice) to order an adequate remedy that will end the harm suffered by them.

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[19] Relief is the remedy offered to the court or proposed by the court which will make the aggrieved party whole again, or which will alleviate or correct the wrong committed.

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PRAYER FOR RELIEF

WHEREFORE, plaintiffs respectfully pray that this Court:

A. Enter a final judgment pursuant to 28 U.S.C. $$ 2201-2202 and Rule 57 of the Federal Rules of Civil Procedure declaring that the policies and practices of the defendants towards the plaintiffs deny them an equal educational opportunity and that such denial violates plaintiffs' rights under the Fourteenth Amendment to the Constitution of the United States, Title VI of the Civil Rights Act of 1964, 42 U.S.C. $ 2000d and the regulations promulgated thereunder.

B. Enter a preliminary and, thereafter, permanent injunction pursuant to Rule 65 of the Federal Rules of Civil Procedure enjoining defendants from continuing to violate plaintiffs' rights under the Fourteenth Amendment to the Constitution of the United States, Title VI of the Civil Rights Act of 1964, 42 U.S.C. $ 2000d and the regulations promulgated thereunder, and 42 U.S.C. $ 1983, and ordering defendants to design and implement a comprehensive plan to insure an equal educational opportunity and effective participation in the learning process to include, among other things:

1. A comprehensive, full-time bilingual-bicultural educational program for plaintiffs with the necessary and appropriate materials and other educational services.
2. A method or procedure for accurately and systematically identifying and classifying Puerto Rican and other Hispanic children on a continuing basis who, by reason of their English language deficiencies, are prevented from equally and effectively participating in the learning process.

NOTES ON THE PRAYER FOR RELIEF

Paragraph A:

It is in the prayer for relief that the plaintiffs begin to spell out to the court what type of relief they seek. In paragraph A, the plaintiffs ask for a final decision by the court in favor of plaintiffs and that it declare defendants' actions or inactions to be violative of plaintiffs' constitutional and statutory rights.

Paragraphs B (1), (2), (3) and (4):

Rule 65 of the Federal Rules of Civil Procedure provides that a court has the power to enter a preliminary injunction and thereafter a permanent injunction where the party seeking the injunction has shown irreparable harm and that he will prevail on the merits of the lawsuit. If the party meets these two requirements, then he is entitled to a preliminary injunction. The Rule also authorizes the issuance of a permanent injunction which will permanently stop the offending party from doing whatever has caused the harm at issue in the lawsuit.

Thus, the plaintiffs ask for an injunction against the defendants whereby the defendants will be ordered to cease violating plaintiffs' constitutional and statutory rights. But, the most important part of paragraph B lies in the plaintiffs' request that the defendants be ordered to design and implement a plan to insure the plaintiffs' children an equal educational opportunity and effective participation in the learning process. That plan should include, according to the plaintiffs: (1) a bilingual-bicultural educational program, (2) method or procedure for identifying and classifying Puerto Rican and other Hispanic children who have English language deficiencies, (3) a method or procedure for evaluating the academic progress of the plaintiff children, and (4) an

3. An effective method or procedure for accurately and continuously evaluating the academic progress of Puerto Rican and other Hispanic children with English language deficiencies.

4. The development and implementation of an intensive and ongoing affirmative action program designed to recruit bilingual personnel for the Barrio Haven School District, from within the school system and from without, and to place such bilingual personnel appropriately in the school system.

C. Retain jurisdiction of this action for all purposes, including the entry of such additional orders as may be necessary or proper.

D. Award plaintiffs their costs and disbursements and reasonable attorneys' fees.

E. Grant such other and further relief as this Court may deem just and proper.

Dated: Barrio Haven, Connecticut
September 23, 1977

Respectfully submitted,

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affirmative action program to recruit and place sufficient bilingual personnel throughout the school system. Before allowing a prayer for relief to be issued in their name, plaintiffs and community organizers should make sure that the prayer for relief outlines generally the kind of relief that they believe should be part of any plan. The claims for relief need not outline in detail all that plaintiffs seek. For example, although not stated in the claims, plaintiffs may want from the court an order to recruit not only bilingual personnel, but bilingual-bicultural personnel. It could be that the school materials sought should also be identified as bilingual-bicultural. There may also be some definite idea in the community regarding the type of identification, if any, that is deemed appropriate. All of these factors and others should be considered although they need not be included in the relief section of the Complaint. The specifics should be added when the opportunity arises like at negotiation sessions or after the case is won. If plaintiffs lock themselves into a specific program when the Complaint is filed, two or three years later when the case is resolved, they may not be able to incorporate into their program any new developments in the bilingual education field.

THE PROCESS: El Vacío (The Void)

In bilingual-bicultural education litigation there is a long period which lasts anywhere from one to three years, which is filled with legal and technical maneuvers by the attorneys of both sides and during which the majority of the members of the class and clients lose interest in the lawsuit. We call this lull *el vacio* (the void). *El vacío* begins almost immediately after the Complaint is filed and ends several years later when the court decides the case or when the lawyers from both sides announce that they are going to enter into a consent decree or settlement.

The following is an attempt to describe superficially the legal events which occur during *el vacío*. More importantly, some suggestions are offered to potential clients and community people for utilizing their time and efforts in order to maximize their participation in the lawsuit and thus increase the likelihood of getting a favorable judgment from the court or a viable settlement agreement from the opposition.

In graphic form, *el vacío* includes the following stages:

A	B	C	D
Defendants' answer to plaintiffs' complaint	Class Action Certification	Discovery	Other Motions

The period from A to D, as previously indicated, can drag out for years.

This involves a series of complicated and technical legal steps which may be of little interest to the plaintiffs. The community can remain dormant during this entire period, and the lawsuit can still be won. But plaintiffs or a community which choose to remain inactive during this or any period of such an important lawsuit, are taking a grave risk that the attorneys or non-community people will assume complete control of the litigation and its outcome.

A. Defendants' Answer to Plaintiffs' Complaint

Ordinarily, bilingual-bicultural lawsuits are filed by mailing the Complaint to the Clerk of the Court of the pertinent United States District Court, with a copy going to the defendants. In order to have a big impact immediately, and to educate and organize the community around the suit, it is suggested that the Complaint be taken personally to the Clerk of the Court, and that just prior to filing, a news conference be held by the lawyers and community leaders at the courthouse steps. Within thirty days from the filing of the Complaint, the defendants will file their answer. The defendants may deny each and every allegation in plaintiffs' Complaint: denying that plaintiffs cannot function effectively in an English-only curriculum; denying that certain plaintiffs read below grade level; denying that they have violated plaintiffs' rights, etc. Or, defendants may contend that they offer bilingual education. Upon close scrutiny and with the help of plaintiffs and their allies in the school system, the attorneys may determine that in fact what defendants offer is English-as-a-Second Language. If this is the case, then defendants may be in violation of federal law, since HEW has dictated and, for the most part, the courts have agreed, that ESL is inadequate at least for the elementary school level.

Instead of answering the Complaint, defendants may admit all of plaintiffs' allegations and move to dismiss the lawsuit on the ground that the Complaint does not state a cause of action upon which the court can fashion an appropriate remedy. In other words, in every lawsuit, the plaintiff must set forth an injury, or claim (in legal terms, cause of action) which is recognizable by the courts and upon which an appropriate and proper remedy can be granted. For example, if one is injured by a speeding automobile, he can bring a negligence suit (which is a cause of action recognizable by the courts) and ask for compensatory damages (money damages to compensate him for his injuries). In the bilingual suit, the defendant would be claiming that the cause of action which plaintiffs are attempting to make out in their Complaint is not one recognizable by the courts and therefore not one in which relief could be granted. Of course, given the precedents which have been established in this area of the law, defendants' claim would be frivolous and would be denied by the court.

B. Class Action Certification

After the defendants have answered plaintiffs' Complaint or have moved to dismiss, plaintiffs will file a motion with the court to have the lawsuit certified as a class action. This topic is covered in depth in the Complaint section of this manual. Suffice it to say that when plaintiffs ask the court to permit them to grant class action status to the lawsuit, they are requesting to be permitted to represent all other individuals who are similarly situated. In other words, plaintiffs want to represent all parents and their school children who attend schools in the district, who cannot function effectively in the English-only curriculum; and who are provided either no programs or inadequate programs to help rectify their situation. The defendants will try to persuade the court that the problems which plaintiffs raise are different from the problems of the rest of the class and, thus, that plaintiffs are not representative of the rest of the class. At this point, defendants may also attempt to have the court dismiss the organizational plaintiff from the lawsuit for lack of standing.[20]

Plaintiffs and other community people can be very helpful during the class certification stage. There should be an attempt to test all plaintiff school children to determine the extent of their English language proficiency. The attorneys should be invited to the community for a meeting with the plaintiffs, and the attorneys should be made to familiarize themselves with every parent and child who is a named plaintiff, as well as with all courses which the school district offers that are supposedly designed to meet the needs of plaintiff school children. The attorneys should also be introduced to all members of the organizational plaintiff and should be briefed on the structure, as well as activities and functions of the organization. The Certificate of Incorporation of the organization or other pertinent documents should be given to the attorneys. If the court certifies the lawsuit as a class action, a press conference should be held in the offices of the organizational plaintiff or in some other convenient and accessible location in the community. The purpose of the press conference would be to announce the favorable decision, to inform the community of the development and to further solidify the community behind the lawsuit. The attorneys should be present at such a news conference.

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[20] All parties who bring a lawsuit must have "standing" to sue. This means that they must be sufficiently injured or aggrieved. Here, defendants would allege that the organization has not been harmed or injured by the alleged conduct of defendants. Or, that it does not have authority from its membership to bring the lawsuit.

C. Discovery

After the Class Certification Motion, the lawsuit enters the stage in the process known as discovery. This stage exists in every lawsuit. Its purpose is to permit each side to discover as much as it possibly can about the opponent's case and position, so that neither side will be surprised at trial, if there is a trial. During the discovery stage, each side will send written questions (interrogatories) to the other side, requesting the submission of documents and the answering of specific questions. Discovery also entails the taking of oral questions and answers under oath (depositions) of the opposing parties. If plaintiffs wish to take the deposition of the Superintendent of the school district, plaintiffs' attorneys will issue formal papers to the court and to defendants' attorneys requesting that the Superintendent appear on a certain date and time, and usually in the offices of the defendants' attorneys. On that date and time, in the presence of a court reporter, the Superintendent will be sworn in by the reporter and he will be asked questions by plaintiffs' attorneys. All questions and answers are recorded by the reporter. It is like court testimony, but it is not in court and the judge is not present. The defendants' attorneys will be present and can object to any questions asked by plaintiffs' attorneys and can direct the Superintendent not to answer objectionable questions. If a party does not answer specific interrogatories, or does not submit a particular document which was requested, or does not answer certain questions during deposition, the attorney for the opposing side can file a motion in court requesting the judge to compel the party to comply. Defendants' attorneys can submit written interrogatories to plaintiffs' attorneys and can also take the deposition of any or all plaintiffs.

The plaintiffs' role during the discovery process can be critical. Plaintiffs and members of the organizational plaintiff should help their attorneys frame the interrogatories and the questions asked at depositions. Of prime importance is the aid that they can render in determining the accuracy and truth of defendants' responses to plaintiffs' interrogatories and depositions. Defendants may submit old or inaccurate documents or may give responses to interrogatories or depositions which are not truthful. Since plaintiffs probably deal on a day-to-day basis with the school system, they probably know the proper answers. Plaintiffs should inform their attorneys that they wish to see defendants' answers to interrogatories and depositions as soon as they are available. It is the plaintiffs' obligation to inform their attorneys of any inaccuracies or untruths.

Plaintiffs and/or members of the organizational plaintiff should also be present when their attorneys take the depositions of defendants. The defendants are more than likely to tell the truth when they are sitting in front of people from the community, who probably know the answers to the questions, and, if not, can certainly find out.

D. Other Motions

After the discovery stage is closed, there may be a series of motions filed and argued in court. Plaintiffs should make it a point to be informed of the topic of these motions and the dates during which they will be argued. They should inform the community of such motions and try to be in court when they are heard, offer the attorneys help that they may need, and after each such event have a press conference.

The following are some suggestions for plaintiffs, organizational plaintiff members and community people for keeping active during el vacío; for maintaining community interest in the lawsuit; and for increasing the likelihood of a favorable disposition:

1. Keep in close contact with the attorneys. Insist on being apprised of all developments in the lawsuit.
2. Insist that the attorneys go to the community occasionally to inform the other plaintiffs as well as the community of progress and developments in the case.
3. Publicize all developments in the news media.
4. Help attorneys to:
   a) prepare interrogatories
   b) answer defendants' interrogatories
   c) prepare for depositions.
5. If a plaintiff is to take a deposition from the other side, be sure that he or she is well informed on all aspects of the case and is well prepared to answer questions.
6. Help the attorneys to determine the accuracy and truth of defendants' answers to plaintiffs' interrogatories.
7. Be present when the attorneys take the depositions of school officials and other defendants.
8. Encourage as many people as possible to be present in court each time there is a court hearing.
9. Give the attorneys guidance and direction.
10. Help the attorneys make the decisions.
11. Conduct a massive publicity campaign in the community to inform people of the existence of the lawsuit and of any progress or developments.

THE PROCESS: Relief

Relief is the stage of the lawsuit at which plaintiffs will seek to obtain a remedy for past wrongs committed by the defendants. At this stage the plaintiffs have already shown that they are entitled to a court-ordered remedy since the court has found that the defendants' practices and policies discriminate against them. Before the court adopts a final bilingual education plan, both the plaintiffs and defendants are usually asked to submit proposed plans. In some instances, the defendants may choose not to submit a plan. In other instances, the defendants may submit a plan seeking to minimize the plaintiffs' victory, while the plaintiffs will tend to submit a proposed plan that will maximize their victory.

The parameters of the proposed relief have already been determined by the way the Complaint was framed, the manner in which the case was tried, and the evidence which was introduced at trial, especially the evidence upon which the court based its decision. Of major importance is the definition of the class adopted by the court, since those included in the class will now constitute the group eligible for any program ordered by the court. Also critical is evidence presented at trial as to the number of Hispanic teachers in the public school system and the number necessary for a viable bilingual education program.

Before members of the Puerto Rican community even approach a lawyer, they may have a good idea of the type of program they are seeking to preserve, enhance or initiate. Many Puerto Rican parents may feel that the program should admit as many students as possible; that the teachers must be bilingual and have a deep understanding of the students' culture; that teachers and administrators be responsive to parents, children and community; and, that there be parent participation in the administration of the program. Some of these elements are in place to one degree or another where a bilingual-bicultural program is already in existence. What may be missing is a permanent funding source for the program, a network for recruitment and hiring of personnel, a procedure for expansion of the program to include a larger number of students, strengthening of the curriculum with the aim of making the bilingual-bicultural program a more effective means for bilinguality, or a proper testing (assessment) procedure to insure that all students who need bilingual education are included in the program.

In those school districts where no program exists, community members should look at model programs in other school districts and the best features of each should be adopted. Experts should also be consulted so that the latest developments and worthwhile innovations can be incorporated into the program.

The definition of the class presented to the court in the complaint will become critical in the relief stage. Where the class has been too narrowly defined, as has been the case in several lawsuits where language, such as "those Puerto Rican children with English language deficiencies who can more effectively learn in Spanish," has been used, then the relief may be limited to only those children who can: (1) speak and write Spanish at a certain level of competency; and (2) who have English language deficiencies.

Under this definition, a child who may benefit from the program would not be eligible unless he meets the two requirements. The definition also creates a need to measure Spanish competence and English language deficiency, thus in effect, setting a double barrier (filter).

As noted in the Complaint section, words such as "deficiencies," "difficulties" and "educationally deprived" should be avoided. They cause people to view bilingual education as compensatory in nature and tend to stigmatize those students who participate in the program. A more appropriate way of defining the class would be: "Puerto Rican children who attend the public schools who, by reason of their national origin or their inability to effectively function in the English-only curriculum, are prevented from equally participating in the learning process." In this case, the argument will be that the child's language is an integral part of his national origin and that he should be entitled to a program of bilingual-bicultural education in order to receive from the public school the full education to which he is entitled. This definition also expands the class to include any Puerto Rican child who could benefit from the program without requiring proof of "proficiency" in Spanish. Few, if any bilingual education lawsuits have been filed using a national origin definition of class. However, the HEW guidelines promulgated pursuant to the Civil Rights Act of 1964, and which have been the basis upon which the courts have ordered the implementation of bilingual education, speak to the needs of national origin-minority group children.

The evidence obtained through discovery and/or presented at trial must confirm the existence of the class, the size of the class, and the manner in which any existing program prevents these children from equally and effectively participating in the learning process. Such evidence will help to tailor the relief to the scope of the harm presented to the court. The extent of the proof assembled in the course of the lawsuit thus has a direct effect on the violations that exist and the remedy which will be ordered by the court. If the violation committed by the defendants is slight, then the remedy ordered will be minimal. Conversely, a flagrant and widespread violation will provoke the court to order a more expansive program.

Much of the solid evidence against the defendants is not known to plaintiffs when they file the Complaint which lists the relief sought. Most of this information is learned during the course of the lawsuit. This is one of the reasons why the relief section of the Complaint is written in the most general terms. Yet, the fundamental outlines of the program which is desired by the community should be set out and incorporated into the Complaint. Neither the community nor the court is limited to these general features as the court has been asked to grant, "such relief as it may deem necessary and proper." This is a catch-all phrase which is incorporated into the relief section. It allows the ultimate remedy to fit the violation committed by the defendants, the gravity of which may not be learned until several years after the lawsuit is filed.

Identification and Eligibility for the Program

In order for a bilingual program to be viable and effective, all children who are eligible for the program and desire to participate, should be accorded the opportunity. To determine eligibility, public school officials should be required to create a method for accurately and systematically identifying and classifying Hispanic children. This may be done by maintaining an accurate school census of all children who may be eligible for the program. The census should be updated on a periodic basis. It should seek to identify all Hispanic children in the public school system. It may also be used to identify: (1) the language spoken at the child's home; (2) which parents speak that language; (3) whether the child watches Spanish language television programs; (4) whether the radio station(s) listened to by the child's parents is in Spanish; (5) whether newspapers read at home are in Spanish; (6) whether the child speaks Spanish at home and/or with friends; (7) whether the child was educated in Puerto Rico for some period of time; and (8) whether the child is currently enrolled in a bilingual program, has been enrolled in such a program, or is receiving or has received English-as-a-Second Language instruction. Such a census can also identify the present reading and mathematics scores that Hispanic children have received on standardized tests administered by the public school.

These questions provide school officials with some information from which they and community members can determine which children may benefit from bilingual education. If school officials insist that those eligible for the program must be non-English speaking, then an agreement must be reached on what constitutes "non-English speaking" and criteria and tests must be developed which identify these children.

Since bilingual education is a fairly recent innovation in the public schools, it will be sometime before tests, assessment instruments and progress evaluators are refined to the point where they will produce reliable information. Puerto Rican parents should therefore be wary of using a single test to screen students eligible for the bilingual program. Many tests are inexact assessment instruments that may actually serve to exclude eligible students. Simply because a child is dominant in English or Spanish does not mean that the child is proficient in either language.

The assessment of a child's eligibility for the bilingual program must seek to examine the child's abilities, skills, mode of behavior, language usage and not merely how well a child does on a pre-determined standardized test. The testing process should include aural examinations, participant observations and linguistic analysis of the child's use of language. Individual teachers as well as outside experts may be used to supplement information on the child. Instead of locking themselves into a particular test or method of assessment, the community should insist that any consent decree or court-ordered program be flexible enough to allow for review of a testing or assessment method chosen so that these may be replaced as they are improved and made more comprehensive. Where the public school seeks to make use of a test, the community should be aware that HEW's Office of Civil Rights has developed criteria to ascertain the validity and reliability of these tests, and proof should be sought from public school officials that they have conformed to these criteria.

The fundamental requirement then, in selecting a method of identification and eligibility, is flexibility in the use of criteria in order to allow for the creation of a reliable data base which contains accurate background information on each child.

Hiring and Recruiting Bilingual Teachers

A bilingual-bicultural program to be effective must be able to attract and retain a teaching staff sufficient in numbers and quality to meet the needs of the children enrolled in the program. It is always difficult for any school system to attract teachers who have mastered a subject and possess the skills to teach the subject well. Teachers in bilingual-bicultural programs must meet these two requirements, and must also have mastered two languages as well as be familiar with the child's culture.

These teachers should be required to meet five criteria--all of which are equally important: (1) fluency in English; (2) fluency in Spanish; (3) mastery of the content area to be taught, e.g., science, history, etc.; (4) mastery of the teaching skills necessary to teach a content area; and, (5) an informed and complete understanding of the child's culture, customs and the Island's history. These stringent requirements will reduce the pool of teachers from which a local school system can draw. The school system may have to expand its recruiting activities to other parts of the country, to Puerto Rico and possibly even to Latin American countries. The logical starting point for such recruitment is the local community itself, and no simple assumptions should be made about the ability of bilinguals from other Hispanic cultures to understand the cultural forms that heritage may take in United States urban settings.

Many colleges that train teachers are increasingly varying their curricula to provide for the skills required by bilingual programs. Public school officials and the community can recruit from these institutions as well. The basic aim is to have an applicant pool of sufficient size so that the best possible candidates for the program are chosen. It is clear that simply because a teacher is Hispanic does not mean that he or she possesses the skills necessary to teach in a bilingual-bicultural program. Only those candidates who most closely approximate the requirements of the program should be hired. There should be no compromise on this point.

An effective program requires that the public school system have full input from community organizations and that the efforts and resources of local colleges be used. Community organizations should be cognizant of the need the schools have for particular types of bilingual personnel and should gear their efforts toward obtaining such persons from as large a recruitment area as is necessary. Community people must be prepared to balance immediate needs in the program with future needs in recruiting a well-trained and adequate staff. In this sense their concern and concerted action must reach beyond local schools to the training institutes preparing professionals for such programs.

The relief ordered by the court should require the public school system to undertake affirmative recruitment efforts for teachers and administrators and insure that a sufficient number of bilingual-bicultural teachers will be hired to meet the needs of the children enrolled in the program.

Bilingual-Bicultural Curriculum

The prime feature of a bilingual-bicultural program is its curriculum design and course content. A bilingual-bicultural program must be able to offer instruction in substantive courses in Spanish. Such subjects as mathematics, science and social studies must be taught in Spanish. The aim is to have the child receive instruction in a language which facilitates his effective participation in learning. A child who already has skills in Spanish should be allowed to develop his knowledge of substantive courses in Spanish. In some bilingual-bicultural programs, courses such as music, art and physical education are taught in English exclusively. This is done, not so much so that the children learn English--which is actually accomplished in other courses--but so that Hispanic children can mix in a classroom setting with other school children who are not in the bilingual program.

However, some feel that in these cultural courses the child should be taught in Spanish so that the socialization process will be accelerated. There is much in the Hispanic child's culture that can be emphasized and studied in art and music and the child should have an opportunity to obtain mastery of these. These courses can be used to further implement the bicultural aspects of the bilingual program.

In designing a bilingual-bicultural curriculum that meets the needs of a specific school system, community representatives should examine what has been done elsewhere. As has been mentioned, the best features of these models should be adopted. The court should receive a proposal which details the curriculum design for the elementary school, the junior high school and the high school. This proposal may also outline the subjects to be taught exclusively in Spanish, and those to be taught exclusively in English. It may include the proportions of time in a given course that will be bilingual, e.g., a mathematics course at the first grade level may be 100% in Spanish; at the second grade level may be 75% in Spanish and 25% in English; at the third grade level may be 50% in Spanish and English, and continue at this level until the sixth grade.

Whichever particular design is proposed, the aim is to seek to foster the child's equal development in both English and Spanish. This may mean a course such as music or art which will be 50% in Spanish and 50% in English, or some other ratio, but which, in either case, will allow for the use of the child's abilities in Spanish for acquisition of English. It is understandable that a variety of curriculum designs abound throughout the country and that a school system may begin with one design and grow into another. The relief ordered by the court should set forth the guidelines for these programs, but should allow for flexible growth in design and curriculum.

Evaluation and Monitoring of the Program

It is very important for the success of the program to incorporate a mechanism in the remedy ordered by the court for evaluating the bilingual-bicultural program. Such evaluation should occur on a periodic basis, possibly annually, in order to determine what changes, if any, are necessary. The evaluation should take into consideration the flexibility which a bilingual-bicultural program requires as it develops and becomes responsive to the particular characteristics of the school system and the children enrolled in it.

Such an evaluation will also provide documentation of the progress which has been made with respect to the implementation of the program and its effectiveness. Yet, it is no substitute for the monitoring which must be done by the community to insure the proper implementation of the program. The court-ordered plan will set forth certain dates by which students are to be identified for the program, by which teachers are to be hired, by which the curriculum is to be in place, and by which the program is to be in full operation. Whether these goals are actually met may be a direct result of the community's ability to monitor the progress taken with each one.

In one case, for example, the community monitored the implementation of a bilingual program and found (1) that thousands of entitled students were not provided the program; (2) that the school system had failed to hire the necessary available personnel; (3) that the school system was using unqualified personnel in the program; (4) that the school system had failed to complete testing of the eligible student population; and, (5) that school officials had failed to submit information to the plaintiffs which had been required by the court. This effort required the community representatives to review and analyze hundreds of pages of reports supplied by the school board with respect to its implementation of the bilingual-bicultural program. Hundreds of hours went into the analysis of these reports. Many hours were also spent interviewing teachers in the program and parents in different schools to find out how the program was being implemented. Many of the curriculum designs for the programs were no more than replicas of what had actually been in place before the lawsuit was filed. As a result of this work, the defendant school system was held by the court to be in contempt of its order to implement the plan; was ordered to take immediate steps to implement the plan; and was liable to plaintiffs' lawyers for attorneys' fees.

Thus, there will be a need for the community representatives to assess the progress of the school system in obtaining funding, hiring personnel, identifying students, providing the appropriate curriculum, and insuring that all eligible students are given an opportunity to participate in the program. In addition, community representatives should be available to receive complaints from parents, teachers and others regarding the program and its implementation. All of this work involves the ascertainment of facts to determine whether a contempt action or other legal move is warranted to obtain full compliance.

The community's work then, begins in earnest once the lawsuit has been won and the program has been developed on paper. The community must receive periodic information from the public schools, while having accessibility to parents, students, teachers, administrators and others who can identify what the problems are with respect to the program. The task is time-consuming but it must be assumed by members of the community, because no one else will be willing to do it.

Allocation of Funds for the Program

The fundamental basis of any bilingual-bicultural program is sufficient funds to carry out the objectives of the program. To the extent possible, funds used should be tax levy funds (tax monies derived from income taxes) since these are not apt to be cut off as are federal monies for temporary programs. The school system must be placed under a duty to obtain and expend the funds required to implement the program, and to safeguard the positions of existing bilingual-bicultural personnel, as well as to hire new personnel when the need arises. In case tax levy funds cannot be obtained, the school system should be required in the relief ordered by the court to seek alternative sources. The school system's obligation should be specifically outlined in the court's order. Ambiguous wording, such as "defendants shall use their maximum efforts," should be avoided since such wording is open to various interpretations.

It is of major importance that the community be informed of any and all obstacles relating to the securing of adequate funds for the program. As funds are needed, failure on the part of the school system to provide them should be immediately brought to the court's attention.

Without adequate funding there may be no program and all that is contained in the court's order will be no more than a list of unfulfilled promises. If a program is created with inadequate funds, it is surely doomed to failure.

THE PROCESS: Attorneys' Fees

After a lawsuit has been concluded either by trial or by settlement, one of the issues that still remains to be litigated is that of attorneys' fees. The court must decide whether the attorneys for the side that was successful should be compensated for expenses incurred and time spent on the case, by the other side. If the court determines that they should be compensated, then it must decide in what amount.

Usually the party that brings a lawsuit must bear his own costs. However, this rule does not apply where Congress, in order to achieve a particular public policy, provides for attorneys' fees by law. The Emergency School Aid Act provides that once a Federal District Court has entered a decision against a local school district for discrimination on the basis of race, color or national origin, the court may order attorneys' fees. This is the statute involved in bilingual education lawsuits and desegregation lawsuits when the attorneys' fees issue is raised. Section 1617 of the statute states:

> Upon the entry of a final order by a court of the United States against a local educational agency, a State (or any agency thereof), or the United States (or any agency thereof), for failure to comply with any provision of this chapter or for discrimination on the basis of race, color, or national origin in violation of title VI of the Civil Rights Act of 1964, or the Fourteenth Amendment to the Constitution of the United States as they pertain to elementary and secondary education, the court, in its discretion, upon a finding that the proceedings were necessary to bring about compliance, may allow the prevailing party, other than the United States, a reasonable attorney's fees as part of the costs.

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This statute has been interpreted to mean that a court is required to grant "an attorney's fee unless special circumstances would render such an award unjust." Aspira of New York, Inc. v. Board of Education of the City of New York, 65 F.R.D. 541, 544 (S.D.N.Y. 1975); Northcross v. Memphis Board of Education, 412 U.S. 427, 428 (1974). (The Aspira case is included in Appendix D.)

Thus, at the end of trial or after a settlement, the attorneys who handled the case may apply to the court for a hearing on attorneys' fees. At this hearing they present evidence of the number of hours spent in litigation. The court will compute the amount of time involved and the cost per hour. The hourly amounts may range from fifteen to one hundred dollars, depending on each attorney's experience and capabilities. The judge will also weigh the factors which precipitated the lawsuit and determine whether the lawsuit was necessary to bring about compliance by the school district. Once these matters are determined by the court, the court may award attorneys' fees.

The fact that attorneys' fees may be awarded is an incentive for private attorneys or legal defense organizations to bring civil rights suits they feel they can win. It also helps to prevent the defendants from intentionally delaying the court process. The effect of attorneys' fees can be dramatic for non-profit legal organizations that must depend for their funding on private, foundation and corporate contributions. An award of such fees demonstrates to these funding sources that the legal defense organization is a successful organization and one worthy of increases in funding. Moreover, it allows for expansion of the legal defense organization. It may thus be able to hire more staff, increase salaries and expand its operations. It may be able to hire individuals to monitor and evaluate the bilingual program.

One of the interesting issues in this area which is rarely, if ever, addressed is whether such funds can be shared with a non-attorney, such as a community organization, to be used, for example, for the purpose of monitoring the implementation of a court decree. The Code of Professional Responsibility, which controls the conduct of attorneys in the State of New York, states:

Canon 3

> Ethical Consideration 3.8. Since a lawyer should not aid or encourage a layman to practice law, he should not practice law in association with a layman or otherwise share legal fees with a layman.

All states attempt to regulate the conduct of attorneys and almost all have provisions similar to New York's Cannon 3.

In American Bar Association Opinion 316 (1967), the ABA has said that, "No division of fees for legal services is proper, except with another lawyer..." ABA Canon 34. This Canon is enforced in New York State by Disciplinary Rule 3-102, which states that, "(A) A lawyer or law firm shall not share legal fees with a non-lawyer..." In ABA Opinion 294 (1958), the ABA held as follows:

> "The receiving attorney shall not under any guise or form share his fee for legal services with a lay agency, personal or corporate, without prejudice, however, to the right of the lay forwarder to share and collect from the creditor proper compensation for non-legal services rendered by the law (sic) forwarder which are separate and apart from the services performed by the receiving attorney."

It appears that while legal defense organizations may be awarded substantial amounts of attorneys' fees as a result of litigation on behalf of communities and community not-for-profit organizations, such communities and their organizations may be prohibited from sharing these fees with the attorneys. However, it is not clear whether it is proper for a law organization, which has been awarded attorneys' fees, to mix these monies with their general funds, then make a contribution to a community organization.

The Code of Professional Responsibility, as well as other bar association guidelines, have come under attack in recent years. Successful challenges have been made on thise sections which prohibit advertisements by lawyers, as well as on those which compelled all lawyers to charge the same rates for similar work done. For example, all lawyers were required to charge, as a house closing fee, 1% of the price of the house. In a case brought by a Virginia home buyer, the United States Supreme Court struck down this practice. A well-planned and strong challenge by an attorney, law organization, or layperson against the restrictive sections of the Code of Professional Responsibility which forbid the sharing of legal fees with laypersons or organizations may be a worthwhile undertaking.

It should be clear that we raise this issue not because we believe that the award of attorneys' fees represents a windfall to the lawyers, or because we blindly believe in the righteousness of the community or its organizations, but because the monitoring of a bilingual education program, after its implementation has been ordered by the court, will require a lot of work and expense by the community or its organization.

The court or the school district do not allocate funds to the community to monitor or oversee these programs, yet this is a very vital function performed by these groups. We see attorneys' fees as one potential source of funds for the community, to be used to monitor the implementation of the bilingual programs.

DESEGREGATION AND BILINGUAL-BICULTURAL EDUCATION

Most Puerto Rican and other Hispanic parents would agree with the Supreme Court's interpretation of the significance of equal educational opportunity which was set out in the landmark *Brown* v. *Board of Education* case of 1954:

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtless than any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

In this decision, the Supreme Court announced the fundamental principle that segregation in public schools is a denial of the equal protection of the laws and declared that racial discrimination in public education is unconstitutional.

Since 1954 there have been many lawsuits brought by children and parents with the intent of stopping local school boards from forcing their children to attend segregated public schools. The courts maintain that school boards have an affirmative duty to desegregate schools. This includes "whatever steps might be necessary to convert to a unitary (non-segregated) system in which racial discrimination would be eliminated root and branch."[21]

Hispanics also brought lawsuits to terminate the segregation which they too had suffered. In U.S. v. Texas,[22] the courts declared that the principles of Brown v. Board of Education applied to the practice of segregation of Mexican Americans. The District Court also found that "Mexican American students are an identifiable, ethnic-minority class..."

In Keyes v. School District #1,[23] as a result of efforts by Hispanic intervenors, the Supreme Court held that Hispanic students should be grouped with Blacks under a "minority" category for the purposes of school desegregation, thus preventing a school which was predominantly comprised of students from the two groups from being considered desegregated. The practice of school districts had been to classify Hispanics as whites, thus, predominantly Black schools were "desegregated" by assigning Hispanic students to these schools. In the case of Puerto Ricans, the use of the standard racial classifications of Black and white makes no sense. Using these classifications, a Puerto Rican family with dark-skinned and light-skinned children may find one child classified as white and one as Black for desegregation purposes. Such a classification would have a traumatic effect on an otherwise unified family.

It is thus evident that Hispanics have either actively pushed for desegregation remedies of their own, while at the same time seeking some form of bilingual education as a remedy for past discrimination; or have found it necessary to actively collaborate with Blacks in desegregation lawsuits initiated by the latter when it is obvious that such suits can affect existing or contemplated bilingual programs. A community that seeks to preserve or expand its bilingual programs must often decide in a relatively short period of time whether to intervene in the desegregation lawsuit. This must be done to insure that student assignment procedures will give special consideration and priority to the distinct educational needs of Hispanic children, especially those in need of bilingual instruction.

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[21] Green v. County School Board, 391 U.S. 430, 437-438 (1968).

[22] 342 F. Supp. 24 (E.D. Tex., 1971), aff'd 446 F 2d 518 (1972).

[23] 413 U.S. 189, 197 & N. 6 (1973).

Intervention

If an Hispanic community or its representatives decide that it is best to intervene in a desegregation lawsuit already in progress, it must secure an attorney(s) for representation in the legal process. In such cases, the community organization(s), parents on behalf of their children, and the children themselves will be known to the court as "plaintiffs," "plaintiff-intervenors," or simple "intervenors." The attorneys for Hispanics must make a motion to the court seeking permission to allow them to intervene, that is, to join the lawsuit. This motion must be accompanied by a complaint similar to the one previously discussed in this manual. The proposed intervenors must show the court, among other things, that they have an interest in the outcome of the existing litigation; that the attempt to intervene is timely; that the existing parties do not represent their interests; and that the existing parties will not be prejudiced if the intervention is permitted.

To be permitted to intervene, the Hispanic parents and community organizations must show that their children who attend public schools have a clear interest in the outcome of the lawsuit. This can be done by showing that whatever decision the court makes on a proposed educational plan will have an impact upon them, especially if bilingual programs may be dismantled or adversely affected by the assignment of Hispanic students to schools without such programs. If intervention is sought before a final remedy has been ordered by the court, the motion should be considered timely by the court, that is, not too late in the proceedings to adversely affect the original parties. It will also have to be demonstrated that the interests of the original parties are not impaired by having the court consider the interest of Hispanic children. Finally, it is usually the case that the parties who brought the original lawsuit are not expert in and have not addressed the issue of bilingual educational programs in the school district. Thus, it can be pointed out that original parties in the lawsuit have failed to represent the interests of Hispanic students.

In certain instances, the court must allow intervention because the intervenors have a right to become part of the suit. In other instances, intervention is allowed at the discretion of the court. If intervention is permitted, it may be for all purposes or for only a limited purpose. In other words, the judge may permit the plaintiff-intervenors to participate in all aspects of the litigation, or he may restrict the participation of the plaintiff-intervenors to only one stage of the court proceedings.

The danger with intervening in a desegregation suit or of bringing a bilingual education lawsuit in a school district where a desegregation suit is pending, is that there is a long line of well-established court precedents in the desegregation area which plainly state that maintaining segregated schools is a violation of the Fourteenth Amendment to the United States Constitution. A finding of desegregated schools in a particular community is thus a finding of a constitutional violation. On the other hand, bilingual education litigation is a new field and while courts have held that failure to provide bilingual education to school children of limited English-speaking ability is a violation of federal law, the courts, including the United States Supreme Court, have not held it to be a constitutional violation. This means that when a judge is presented with a segregation case and at the same time a bilingual education case, the court will place more importance on the desegregation case because it has its basis in the Constitution and bilingual education may be subordinated. Its basis is in federal law, but not in the Constitution.

To elaborate on the experience of Puerto Ricans and other Hispanics with desegregation cases, it would be appropriate, at this point, to look at some specific cases: Denver, Boston, Delaware and Milwaukee. These cities all have Puerto Rican and other Hispanic populations that were affected by desegregation suits initiated by Blacks and which had the potential to upset the efforts of Hispanics to secure bilingual education programs. In all of the cases which will be discussed, Hispanics were faced with the same dilemma: whether or not to intervene, in order to protect their interests, in an already existing lawsuit brought to desegregate the public schools, or to face the possible dispersal of their student population throughout the school system, thus jeopardizing existing or contemplated bilingual programs. Other questions posed were: How does an Hispanic community retain and/or expand a bilingual program when the public schools are ordered to desegregate and Hispanic students are subject to the same student assignment and re-assignment procedures affecting Blacks and whites? Would these result in an unfair and disproportionate movement and dispersal of Hispanic students precluding the desired clustering necessary to ensure good bilingual programs?

In Keyes v. School District #1, a group of Blacks and Chicanos brought an action demanding that the Denver public school system be desegregated. The case was heard several times at the District, Appellate and United States Supreme Court levels. The courts found that segregation as a matter of law and as a matter of fact existed in Denver and ordered that the schools be desegregated. The Congress of Hispanic Educators intervened in the case asking that the needs of non-English speaking Hispanic students be taken into account in any desegregation plan authorized by the court. The court ordered the school district to implement a plan for bilingual-bicultural education prepared by Dr. José A. Cárdenas for plaintiff-intervenors. The Cárdenas Plan called for the clustering of Chicano students who needed bilingual education in five schools, thus maintaining large numbers of minority students in these schools (77% - 88%). The plan also called for a complete overhaul of the school system's entire approach to the education of minorities. It extended to matters of educational philosophy, governance, instructional scope and sequence, curriculum, student evaluation, staffing, non-instructional service and community involvement.

When the case was appealed to the Tenth Circuit Court of Appeals, the court rejected the Cárdenas Plan and indicated that the lower court had abused its discretion by adopting it. The Court of Appeals held that bilingual education is not a substitute for desegregation. It pointed out that although bilingual instruction may be required to prevent isolation of non-English speaking students, such a plan must be subordinate to a plan for school desegregation. The Court of Appeals further pointed out that the proof at the trial only established liability on the part of defendants with respect to maintaining segregated schools. Intervenors had not attempted to show any evidence that would establish liability on the bilingual education issue. Not having proved liability, plaintiff-intervenors therefore were not entitled to any relief. However, this should not be interpreted to mean that the court rejected bilingual education as a means to provide for the educational needs of Hispanic children. For this reason, the court remanded the case back to the district court for a determination of the relief, if any, necessary for Hispanics to have an opportunity to acquire proficiency in the English language.

In Morgan v. Kerrigan, Black plaintiffs brough suit to desegregate the Boston school system. Plaintiff-intervenors, El Comité de Padres Pro Defensa de la Educación Bilingüe, representing the class of Spanish-speaking students and their parents, were allowed to intervene in the remedy stage of the lawsuit and were able to present evidence regarding the inadequacy of the existing bilingual program. The court ordered the clustering of Spanish-speaking children in sufficient numbers to insure a viable program. An important precedent established in Boston is that, for desegregation purposes, students received priority in school assignment based on bilingual needs. In addition, the court allowed, for one school, a minority enrollment of 69%, which exceeded the maximum allowable ratio of minority students for all other schools. The Boston case differs from Keyes in one important point: while liability was not proved in Boston on the bilingual education issue, entitlement to relief was allowed.

In Wilmington, Delaware, the court permitted a very restricted intervention when it allowed Hispanics to intervene at the remedy stage of the proceedings so that the existing bilingual program could be protected. In this case the court wrote a thirty-eight page decision with respect to the remedy to be ordered for the public schools. Only the following paragraphs were devoted to the needs of Hispanic students:

> B. Hispanic Students
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> The Court allowed representatives of the Hispanic population in the area to intervene to protect the existence of certain bilingual programs and to insure that the success of those programs would not be endangered by any plan which the Court might order.
>
> Our allowance of the intervention and our comments here are designed only to protect the program as it now exists. We make no determination on the present adequacy of compliance with the requirements of 20 U.S.C. $$ 880b, et seq. Nor do we here find that the members of the Hispanic population have otherwise been victims of any discriminatory action on the part of any school district which is part of this litigation. (Footnotes omitted.)
>
> With regard to those students already identified as requiring bilingual education, or who are otherwise taking part in such education now, the interim board or such other board or boards as may be appointed by the operation of state law, shall in the course of

> implementing this decision insure that those students will be placed in schools in sufficient numbers to allow the program to continue, and shall insure that the program will not be reduced or cut back as to those students presently receiving it. In all other respects, we assume that the new district or districts will comply with the requirements of federal law in this regard, including those statutes or regulations of HEW which may require the identification of other students needing such assistance and the provision of the programs made necessary thereby. We also note that in enrollment statistics as provided by the State, Hispanic students are listed as a minority population, and we assume that the new board or boards will so categorize them for purposes of determining whether a school is racially identifiable.(166) (Footnotes 163 - 165 omitted.)[24]

The court would not rule on whether Hispanic students would be protected by the Fourteenth Amendment in this case because it heard no testimony on the matter. The only reason for which intervention was permitted was to allow those students already identified as requiring bilingual education to be placed in schools in sufficient numbers so that the existing program could continue.

In Armstrong v. O'Connell,[25] Hispanic parents and students also applied for intervention in this Milwaukee, Wisconsin desegregation case. The City-Wide Bilingual Bicultural Advisory Committee (an organization comprised of Puerto Rican and other Hispanic parents) argued for intervention during the remedy stage. It was claimed that intervention was the only means to insure protection of existing and contemplated bilingual programs; that it was a means to protect Hispanics from unjust and unnecessary dispersal; that Hispanics should be granted priority in the assignment process so as to insure assignments to bilingual programs; and that the court should declare Hispanics as a distinct ethnic minority. Originally, the court's decision and order placed Hispanics under a "non-Black" category. This, the school district declared, meant that Hispanic students were "whites" for desegregation purposes.

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[24] Footnote (166) for this court decision explains the following:

> We have heard no testimony on the question of whether Hispanic students would constitute a minority in Delaware for Fourteenth Amendment purposes, and we do not determine that the State Board or the local board or boards would be constitutionally required to treat the Hispanics as a minority group. The issue before the Court on the intervention was solely the protection of existing programs, and our Opinion is limited strictly to that question.
>
> See generally, Keyes v. Denver School District #1, 413 U.S. at 197, 93 S. Ct. at 2696, 37 L. Ed 2d at 556.

[25] Civil Action No. 65-C-173, April 1977.

Both the plaintiffs and defendants opposed their intervention. This appears to be the first instance where Black plaintiffs have refused to allow Hispanic parents to intervene in a desegregation case.

The District Court, in denying intervention, pointed out that "the critical inquiry here is whether or not on the facts of this case the petition is premature." The Court argued that Hispanic intervenors failed to demonstrate that there was or would be any "impingement upon the petitioners' interest in bilingual-bicultural programs, nor is there an indication that any harm will devolve on petitioners as a result of remedial actions to be taken." Further, it stated that the defendants had expressed a commitment to continuation and expansion of bilingual programs through their actions and policies and there was no basis for the court, at the time, to question their intentions.

In its closing remarks, the Court declared:

> In sum, the Court is not unmindful of the interest of the petitioners in bilingual bicultural programs. But as the petitioners have demonstrated no present or likely future impairment of their interests, the motion to intervene will be denied with the understanding that the petitioners may renew their motion at such time as it appears that their interests are impaired by the remedial course of this school desegregation case.[26]

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[26] See Appendix E for full text of Opinion.

While the Court's decision on the motion to intervene kept Hispanics under a "non-Black class," it did include in its final desegregation order and remedy a clause allowing the school district to implement a local school board policy that made Hispanics a distinct ethnic group:

> Nothing in this order is intended to prevent defendants from designating Hispanic students, Native Americans, and other minority students as separate minority populations and according them priority over other non-black students in assignments to schools with programs designed to meet their special needs.[27]

Subsequent to the Court's final order, the Supreme Court called upon the appeals court to reconsider the Milwaukee case as per its recent decisions requiring a finding of segregative intent by the school board throughout the local school system before ordering a district-wide remedy. The Appellate Court in turn vacated the case and ordered the District Court to reconsider its previous findings in light of this standard. Therefore, it is possible for Hispanics in Milwaukee to renew their application for intervention.

In sum, Hispanic communities considering litigation to achieve bilingual education and/or desegregation are faced with several alternatives. They can intervene in an existing desegregation lawsuit as has been discussed. Or, they can initiate a separate bilingual education lawsuit without intervening in the desegregation case. However, the court may consolidate these two lawsuits and treat them as one. In addition, the Hispanic community may bring a desegregation lawsuit of its own and request bilingual education as part of the remedy. In fact, in the Southwest, in a number of desegregation suits, courts have ordered the implementation of bilingual education programs as affirmative relief for past discrimination. However, bilingual education cases have, to date, not been decided on the original constitutional grounds argued, but rather as a violation of federal law.

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[27] Armstrong v. O'Connell, ____ F. Supp. ____, Civil Action No. 65-C-173 (E.D. Wisc. denied March 17, 1977).

There is a need for those seeking desegregation and those desiring bilingual education to work together and reconcile any differences. The two concepts are not incompatible, both seek the same end: an equal opportunity for quality education. Effective bilingual education programs can be implemented in a desegregated school system; desegregation is not adversely affected by the presence of bilingual education programs. Advocates of desegregation and bilingual education live in the same community, and they must take the lead to avoid conflicts and confrontations.

The area we have sought to describe is a very sensitive one which must be given much thought and planning by the Hispanic community. The most important task of providing form and direction to the goal of obtaining effective school desegregation and bilingual education is one which ultimately rests on the Hispanic community.[28]

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[28] For further discussion on the bilingual education/desegregation issue, see Bilingual Education and Desegregation: A New Dimension in Legal and Educational Decision-Making, by Ricardo R. Fernandez and Judith T. Guskin Pp. 1-10 and 16-21 and footnotes. From BILINGUAL EDUCATION, edited by LaFontaine, Persky and Golubchick, reproduced with permission from Avery Publishing Group.

EPILOGUE

The strategy discussed in this manual--litigation in behalf of bilingual-bicultural education premised on the right to equal education opportunity--is only one avenue in the quest to insure quality education for Puerto Rican children. But this strategy has limitations. As has been repeatedly noted, the courts and school personnel tend to view bilingual education as compensatory. They see its goal as merely to remedy the child's lack of English language skills. For this reason, and because of other misconceptions about the maintenance model, the transitional model is the basic program that has been achieved through litigation. The mere mention of implementing bilingual education makes many English monolingual teachers and their unions uneasy and insecure because of fear that they may be displaced by bilingual teachers, or, because of ethnic prejudices, ignorance and other attitudes. Court intervention in educational matters may serve to further alienate many teachers and their unions to the extent that the merits of court-ordered programs become muddled.

In addition, since bilingual education lawsuits are many times filed while desegregation suits are pending, the bilingual education claims may be subordinated or even rejected by the courts. While the courts have ruled on the unconstitutionality of segregation, the right to bilingual education rests on federal laws and HEW guidelines that interpret those laws, and not on the United States Constitution.

Furthermore, attaining bilingual education through litigation in one school district does not affect children who may direly need it in other districts in the same state, indeed, in a neighboring school district. And, of course, litigation takes a long time. Advocates of bilingual education, if they pursue the legal route, must wait years from the time the decision is made to seek redress until final disposition. During this time, Puerto Rican children continue to languish in the schools without any programs that will insure their effective participation in the educational process.

As this manual attests, of course, we do not reject the litigation strategy. Bilingual education, although not yet a constitutional right, is well embedded in the law by virtue of the favorable court decisions that have been gained. Lawsuits can be a tool for powerless communities to organize against school officials who fear the negative publicity and who are concerned with the costs of defending a lawsuit. They may also provide the stimulus for the passage of state legislation for bilingual education. However, it is our position that, although use of the legal process should be maximized, its limitations should be kept clearly in view and that other alternatives, especially continuous pressure for administrative and legislative actions, should be simultaneously explored in all cases.

In considering legal and other strategies, the colonial background of the Puerto Rican language question must also be kept in view. Remedies secured in legal actions as well as the educational theories behind mandated solutions have assimilationist goals. The dominant policy in the United States historically has been to suppress the use of any language other than English in public instruction. Although attempts have been made to apply this policy also in American colonies and possessions, in the case of Puerto Rico, Spanish remains, in principle, the chief language of instruction in the schools. There is a long history of organized resistance by the Puerto Rican people to the imposition of English.

In Puerto Rico, the United States ordered the use of English in public instruction immediately after taking possession in 1898. In 1917, Congress further defined the relationship with the Island by enacting the Jones Act, which conferred United States citizenship upon Puerto Ricans. Language policy remained the same, while in practice, Spanish was still being used in the schools. In 1947, the Commissioner of Instruction of Puerto Rico declared Spanish to be the official language to be used in the public schools. Although this policy has been opposed by some United States legislators as well as some private individuals, it has not been overturned. In fact, Congress has acquiesced in this practice by continuing to provide financial assistance to the Island's educational system.

While the United States government has not succeeded in displacing the Spanish language in Puerto Rico, the retention or maintenance of their language and culture has not been so easy for those Puerto Ricans who have migrated to the United States. Through economic and other policies, the United States and Commonwealth governments have encouraged, and some claim have in effect forced, the migration of hundreds of thousands of Puerto Ricans to the continental United States. But upon arrival to the mainland, Puerto Ricans are required to submit to an English-only educational system and society. Being United States citizens with a Spanish linguistic and cultural tradition, and having the right to unrestricted entry into this country, it would seem logical that bilinguality would be encouraged and maintained. Along with English, Spanish should be required in order to give continuity to the educational process for Puerto Rican children, as well as to facilitate communication and understanding between United States-born children of migrants and their relatives who have remained in Puerto Rico. Communication and understanding among Puerto Ricans living in the United States would also be made easier. But the United States government has not been so benevolent.

United States assimilationist goals thus place a very heavy and undue burden upon the people of countries which it has colonized. Not only are colonized people forced to abandon their language and culture when they relocate to this country, but attempts are made to uproot the language and culture in their homelands. In addition, United States-born children of migrants find it extremely difficult to communicate with relatives who remain in the homeland. When second generation Puerto Ricans return to the Island, either to visit or to remain permanently, many feel like foreigners in their own country.

Native American communities in this country have attempted to grapple with similar situations, as well as with land rights issues, by instituting lawsuits which invoke the stipulations and intent of their treaties with the federal government. The Jones Act, as well as other laws and court cases which established or interpret the relationship between Puerto Rico and the United States must be extensively researched to determine whether arguments can be set forth that would firmly establish in the law bilinguality as a right for Puerto Ricans in the United States.

Among the many important questions which must be addressed is the following: when one nation colonizes another which has a distinct language and culture, and the colonizing country, as part of its national policy, strongly encourages inhabitants from the colonized country to migrate and to move about freely within the colonizing country, what duty or obligation does the colonizer have to guarantee or facilitate the retention or maintenance of the language and culture of the people of the colonized country? As the movement of workers from formerly colonized regions to metropolitan centers intensifies, as it has in recent decades, such questions take an increasing importance on a world scale.

The National Puerto Rican Task Force on Educational Policy has proposed the establishment of a language and education institute (see Introduction) that could coordinate some of the discussion and research needed to crystalize, sharpen and advance these questions, as well as others which the Puerto Rican community may raise. As has previously been pointed out, the Jones Act, other legislation and court cases which established and interpreted the relationship between the United States and Puerto Rico, must be looked at very closely in the search for answers based on judicial principles. The United States Constitution would, more than likely, not supply any solutions. Also to be studied are the struggles for language rights of other peoples throughout the world. The situation of French Canadians would be a case in point.

The United States Congress addressed some of the issues raised above when it passed the Voting Rights Act of 1965. This law permitted Puerto Ricans with a sixth grade education from schools on the Island to be exempt from English literacy tests before they could vote in the United States. Under attack by the English-speaking New York voters, the United States Supreme Court upheld the validity of the Act and said:

> More specifically, section 4(e) (of the Voting Rights Act of 1965) may be viewed as a measure to secure for the Puerto Rican community residing in New York non-discriminatory treatment by government--both in the composition of voting qualifications and the provision of administration of government services, such as public schools, public housing and law enforcement.[29]

The same court, in one of the early cases dealing with the Jones Act, characterized this legislation as an attempt to place Puerto Ricans "on an exact equality with citizens from the American homeland, to secure them more certain protection against the world, and to give them an opportunity, should they desire, to move into the United States proper, and there without naturalization to enjoy all political and other rights."[30]

The words of the United States Supreme Court and the intent of Congress in promulgating the Voting Rights Act do not ring true because Puerto Ricans cannot enjoy "exact equality" of "all political and other rights" unless **and until bilinguality in education and other institutions** comes to pass among Puerto Ricans in the United States.

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[29] Katzenbach v. Morgan, 384 U.S. 641 at 652 (1966) (emphasis added). (See Appendix G.)

[30] Balzac v. People of Porto Rico, 258 U.S. 298 at 311 (1922) (emphasis added).

Clearly, some of the arguments and questions posed in this section need more research and clarification. Hopefully, the Puerto Rican community can begin to discuss and set forth other alternatives and strategies which will move it closer to a resolution of the predicament in which it finds itself.

APPENDICES

Rule 23.

CLASS ACTIONS

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b) (3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b) (1) or (b) (2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b) (3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c) (2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

As amended Feb. 28, 1966, eff. July 1, 1966.

Appendix E

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

U. S. Dist. Court East Dist. Wis.
FILED
APR 13 1977
at______o'clock______M
RUTH W. LA FAVE, Clerk

KEVIN ARMSTRONG and KRAIG ARMSTRONG, minors, by Roosevelt Savage and Rochelle Savage, their parents and next friends;

MARY LOU HICKS and PRESTEN HICKS, minors, by Paul L. Hicks and Rose B. Hicks, their parents and next friends;

JEAN ROBINSON, by Alonzo Robinson and Theresa Robinson, their parents and next friends; and

ANDREW SMITH, GRANTLEY H. SMITH, and KERMIT SMITH, minors, by Kenneth L. Smith and Phyllis G. Smith, their parents and next friends;

Plaintiffs,

v.

Civil Action
No. 65-C-173

DONALD J. O'CONNELL, THOMAS BRENNAN, ANTHONY S. BUSALACCHI, MARGARET DINGES, GERALD P. FARLEY, STEPHEN JESMOK, JR., MARIAN McEVILLY, MAURICE J. McSWEENEY, EDWARD S. MICHALSKI, CLARA A. NEW, EVELYN T. PFEIFFER, LORRAINE M. RADTKE, LOIS RILEY, DORIS STACY, and LEON W. TODD, JR., Members of the Board of School Directors of the City of Milwaukee;

LEE R. McMURRIN, Superintendent of Schools of the City of Milwaukee; and

THOMAS A. LINTON, Secretary-Business Manager of the Board of School Directors of the City of Milwaukee;

Defendants,

MILWAUKEE TEACHERS' EDUCATION ASSOCIATION,

Undesignated
Intervenor.

DECISION AND ORDER
ON MOTION TO INTERVENE

In this school desegregation case which has recently entered its final remedial phase, the City-Wide Bilingual Bicultural Parent Advisory Committee and certain Hispanic students seek to intervene as representatives of a plaintiff class comprised of Hispanic students enrolled in bilingual programs in the Milwaukee public school system.[1] Counsel for the Hispanic petitioners inform the court that Hispanic students comprise approximately 5 per cent of the student enrollment in the Milwaukee school system. The petitioners have moved to intervene as of right pursuant to Rule 24(a), F.R.Civ.P., or, alternatively, to intervene permissively pursuant to Rule 24(b), or to intervene pursuant to Rule 23(d). The court has had the benefit of extensive briefs and oral argument on the motion, and for the reasons stated hereafter, the motion to intervene will be denied.

A brief recital of the chronology of the remedial phase of this litigation will place the petitioners' motion in context. By decision and order dated January 19, 1976, this Court determined that the defendants had intentionally maintained a segregated school system, and on that date the defendants were ordered, inter alia, to begin the formulation of remedial plans. Amos v. Board of City of Milwaukee, 408 F.Supp. 765 (E.D. Wis. 1976). As a preliminary matter, the Court certified two plaintiff classes: one consisting of all black pupils presently enrolled and those black pupils who will in the future become enrolled in the Milwaukee public school system, and the other consiting of all nonblack pupils presently enrolled and those nonblack pupils who will in the future become enrolled in the Milwaukee public school system. 408 F.Supp. at 775. Thus, under the terms of the January 19, 1976, decision and order, the Hispanic pupils are members of the nonblack class.

In May of 1976, the Special Master held hearings on the various proposed plans. By order dated June 11, 1976, the Court established desegregation guidelines, and on July 9,1976, the Court ordered that the first stage of desegregation, or Phase I, commence for the 1976-77 school year pursuant to the guidelines established by the Court and a plan prepared by the defendants. Phase I has been successfully completed.

Early in the fall of 1976, the defendants, the school administration, and various community representatives began preparation of desegregation plans for the remaining two years of the desegregation effort. By letter dated October 22, 1976, the defendants' attorney advised the court of the defendants' adoption on October 5, 1976, of a statement entitled "Major Issues, Assurances, and Legal Principles Affecting the Hispanic Pupil During Desegregation Efforts."[2] The defendants submitted two plans to the Court in early January of 1977. On February 2, 1977, the petitioners herein filed their motion to intervene. On February 3-5, 1977, the Special

Master conducted hearings on the various proposed remedial plans for the school years 1977-78 and 1978-79. On February 17, 1977, the Special Master submitted his recommendation to the Court, and the parties then commented on the Special Master's recommendations. On March 11, 1977, a hearing was held before the Court, and on March 17, 1977, the Court issued its final remedial order. Pertinent to the instant motion, paragraph 3(j) of that order states:

> "Nothing in this order is intended to prevent defendants from designating Hispanic students, native Americans, and other minority students as separate minority populations and according them priority over other non-black students in assignment to schools with programs designed to meet their special needs. * * *"

At this juncture it is appropriate to note what petitioners herein seek and what they do not seek. The petitioners state that they seek an intervention limited to the protection of their bilingual-bicultural educational programs during the remaining two years of the remedial phase, programs to which they claim entitlement under federal and state law. See 20 U.S.C. & 1703(f) and Chapter 395, Wisconsin Laws of 1975. Recognizing that the Court issued its final remedial order in this matter on March 17, 1977, the petitioners, if granted intervenor status, would seek to have the language of paragraph 3(j), supra, amended so that the paragraph is mandatory rather than permissive. The petitoners do not claim that a dual system has been operated with respect to Hispanic students, nor do they seek to have schools which may be identifiable as Hispanic schools eliminated. On the contrary, petitioners request that the existing groupings and concentrations of Hispanic students in various schools offering bilingual-bicultural programs no be disturbed.

Rule 24, F.R.Civ.P., requires that a motion for intervention, whether of right or by permission, be timely filed. Clearly, it would be untimely, that is, too late in the proceedings, for the petitioners to intervene for purposes of a claim that the defendants have maintained a dual system as to Hispanic students. However, the petitioners have interposed a motion to intervene for the purpose of protecting their constitutional and statutory interest in bilingual-bicultural programs as they may be affected by the remedial course of this litigation. The critical inquiry here is whether or not on the facts of this case the petition is premature. For the reasons detailed below, the Court is persuaded that the petition is premature and accordingly must be denied.

Without determining the scope of petitioners' entitlement to bilingual programs, the Court notes its concurrence with Judge Wisdom's observation that "(n)o remedy for the dual system can be acceptable if is operates to deprive members of a third ethnic group of the benefits of equal educational opportunity." United States v. Texas Education Agency, 467 F.2d 848, 869 (5th Cir. 1972). However, on the facts of this record, there is no present demonstration of impingement upon the petitioners' interests in bilingual-bicultural programs, nor is there an indication that any harm will devolve on petitioners as a result of remedial actions to be taken. As was mentioned previously, paragraph 3(j) of the court's final remedial order of March 17, 1977, provides that the order does not prevent the defendants from according Hispanic students priority over other nonblack students in assignment to schools with bilingual-bicultural programs. Moreover, the guidelines described in paragraph 3(c) of that order are a liberalization of the court's prior guidelines in an effort to provide the defendants and the school administration with the flexibility needed to deal fairly with such concerns as bilingual-bicultural programs. The defendants have expressed a commitment to continuation of the bilingual-bicultural programs, and the defendants reconize their statutory obligation to provide such programs. See in particular paragraphs 4 and 6 of the document entitled "Major Issues, Assurances and Legal Principles Affecting the Hispanic Pupil During Desegregation Efforts" contained in footnote 2. The court has no basis at this time on which to question the defendants' expressed intentions in this area.

Turning then to an examination of the various rules under which petitioners seek to intervene in this action, the court must conclude that intervention of right pursuant to Rule 24(a), F.R. Civ. P., would be inappropriate. Although petitioners claim an interest relating to the subject of the action herein, the petitioners are not presently situated so that as a practical matter their interests are or will be impeded by the remedial steps taken in the instant matter. Should the situation alter in the future, the petitioners may renew their petition to intervenue.

With regard to permissive intervention pursuant to Rule 24(b), F.R. Civ. P., the inquiry thereunder is whether or not petitioners' claim or defense and the main action have a question of law or fact in common, and whether or not intervention will unduly delay or prejudice the adjudication of the rights of the orginal parties. The rule is not phrased in such a way as to afford easy application to the remedial stage, as opposed to the liability stage, of a school desegregation case. Nor is it useful to divorce petitioners' proposed intervention from the context of this action as a class action. the petitioners arepresently members of the class of nonblack pupils in the main action. Rule 23(d), F.R. Civ. P., pertaining to orders premitted in class actions that the court may permit intervention for the protection of the members of the class or otherwise for the fair conduct of the action. While the court will not close its doors to persons whose interests are harmed or threatened with harmby the progression of this suit through its final remedial phase, in fairness to present litigants and in the interests of the manageability of this lawsuit, it is incumbent upon the court to consider carefully an application for intervention. The court conculdes that at this time neither the protection of the members of the class nor the fair conduct of the action warrants the granting of petitioners' motion.

In sum, the court is not unmindful of the interests of the petitioners in bilingual-bicultural programs. But as the petitioners have demonstrated no present or likely future impairment of their interests, the motion to intervene will be denied with the understanding that the petitioners may renew their motion at such time as it appears that their interests are impaired or likely to be impaired be the remedial course of this school desegregation case.

IT IS THEREFORE ORDERED that the motion of the City-Wide Bilingual Bicultural Parent Advisory Committee, et al., will be and it hereby is denied.

Dated at Milwaukee, Wisconsin, this 13 day of April, 1977.

John W. Reynolds

Chief U. S. District Judge

MAJOR ISSUES, ASSURANCES, AND LEGAL PRINCIPLES AFFECTING THE HISPANIC PUPIL DURING DESEGREGATION EFFORTS

The need and importance of bilingual bicultural education in a systematic and continuous developmental program in the Milwaukee Public Schools for children of limited English ability and for maximizing other children's language potential and cultural understanding and appreciation has been recognized and endorsed by official action of the Board of School Directors. Pertinent federal legislation and the Bilingual Bicultural Legislation Act (Chapter 395, Wisconsin Laws, 1975) support and require bilingual bicultural education as a viable approach for providing equal educational opportunities for limited English ability students. There are also judicial and legal precendents that have forund violations of the Civil Rights Act, Title VI, when bilingual bicultural programs are non-existent or non-available to pupils in need of them (Serna v. Portales; Lau v. Nichols).

Bilingual bicultural education and integration are compatible and feasible. Both efforts are attempts at providing equality of educational opportunity for pupils. Bilingual bicultural education programs are to enhance integration efforts as opposed to having a segregative effect. Social and cultural interaction are further assets to language and cultural maintenance.

The Milwaukee Public Schools' bilingual bicultural program is at present in the Spanish-English area. It mainly serves pupils of Hispanic descent enrolled in the Milwaukee Public Schools but is available to any child.

In order to assure continuity of bilingual bicultural education programming and equal educational opportunites for Hispanic pupils and for other ethnic/language groups as might appear necessary during desegregation efforts, the Board of School Directors needs to endorse and commit itself to the following:

1. Hispanic pupils need to be considered and ethnic/racial/minority group, and an identifiable class, forming part of the "minority group pupil" population of the Milwaukee Public School System.

2. The combined numbers of "minority group pupils" shall be kept within the ratios set by the court order.

3. Schools with Hispanic pupil enrollment constituting most or all of the minority pupil population shall be considered desegregated if the percentages of minority pupils fall within those set by the court.

4. Criteria shall be set, in accordance with Chapter 395, to determine bilingual bicultural needs and eligibility to bilingual bicultural programs of Hispanic pupils volunteering for specialty programs. Parents of pupils eligible for bilingual bicultural education programming shall so be advised prior to the honoring of any transfer request to a non-bilingual specialty program.

5. The transportation of Hispanic pupils to other schools, different from those they are in attendance at, shall take place in accordance with the Pupil Transfer Policy anf the Board adopted Transportation Policy..

6. Hipanic pupils' right to bilingual bicultural education programming will always be abserved in line with the principles of equality of educational opportunity and guided by the rules set forth by the Bilingual Bicultural Education Act, Chapter 395, Laws of Wisconsin, 1975. This also shall apply to other ethnic/language groups participating in bilingual bicultural education programs.

7. The special status of teachers in bilingual bicultural education programs with regard to seniority is recognized. Teachers needed in bilingual bicultural education programs will be assigned and/or retained in schools in response to bilingual bicultural education needs.

   The categorization and implications of the movement/transfer of Hispanic and bilingual teachers as per the court order shall be discussed, negotiated and resolved with the bargaining units and the final agreements will become part of this statement of assurances.

8. The Board shall adopt the above as part of the planning for phase two and three of the desegregation/intergration plan.

Appendix F

BILINGUAL EDUCATION AND DESEGREGATION:
A NEW DIMENSION IN LEGAL AND EDUCATIONAL DECISION-MAKING

Ricardo R. Fernández and Judith T. Guskin

The past decade has witnessed the rapid growth of bilingual bicultural programs throughout the United States. Beginning with the passage in 1968 of federal legislation and modest appropriations (Title VII of the Amendments to the 1965 ESEA), and with the support of enforced regulations and a number of significant court decisions which culminated in Lau v. Nichols, bilingual bicultural education has "come of age."[1] This process, which has been accompanied by the involvement of community groups from different language and cultural backgrounds, has resulted in the passage by several of various forms of state legislation pertaining to bilingual bicultural (B/B) Education.[2] Federal expenditures for bilingual education presently exceed $100 million, cover over 40 language groups, and additional expansion is anticipated since the majority of children in need of B/B Education are still not being served. Bilingual bicultural education represents one of the major thrusts in present U.S. public educational policy and its influence on the nation's educational system is evident, although it is as yet impossible to judge its eventual impact on society at large. Parallel to this phenomenon, over the same period time another thrust in public educational policy has become intensified -- school desegregation in major urban areas outside of the south. Supported by a series of court decisions following the historic Brown case, the movement to end segregation of the nation's public schools, which had begun to gather momentum in the late fifties and early sixties in the South, began to expand to the North and to the West in the early

1970's. The issue of involuntary transfers and busing students to achieve "racial balance" in schools (a new definition of desegregation) emerged and controversy still abounds over this and related issues in major urban centers throughout the country. From San Francisco and Los Angeles to Denver, from Omaha and Chicago to Boston; from Minneapolis to Milwaukee to Houston and Austin, school districts are faced with litigation and court-ordered desegregation. While desegregation litigation was still concentrated in the South, there was no public consciousness regarding its effects on cultural and linguistic minorities who also face discrimination. Once suits were filed and remedies imposed in cities with significant minority populations in addition to Blacks, another element entered into the picture and it became necessary to consider these other racial and ethnic groups in planning and implementing desegregation.

This paper will attempt to discuss in general terms some of the critical issues which have arisen as a result of the contact between the thrusts for bilingual bicultural education and school desegregation in urban areas over the past several years. Since these issues are quite recent and in many instances are still being debated in legal and educational circles, these comments, which are preliminary in nature, are advanced in the spirit of attempting to foster dialogue in the hope that this will lead to their eventual satisfactory resolution in terms not only of the political compromises underlying desegregation, but also the needs and desire of minority children, their families and communities.

Equal Educational Opportunity:
Desegregation and/or Bilingual Bicultural Education

While Blacks and Hispanos and other minority groups as well espouse the same goal in terms of equality of educational opportunities, the means to achieve the same often appear to be in conflict. This apparent conflict is based on legal precedents, federal (and, at times, state) legislation and, very importantly, differing perceptions by specific communities on the goals (immediate and ultimate) of desegregation and its logical conclusion -- integration.

The body of law and judicial precedents pertaining to desegregation of public educational systems is considerable. Inexorably, the courts have moved to dismantle "dual systems," which were found to be inherently unequal in Brown, and to strive toward the operation by school boards of "unitary systems," wherein equality of educational opportunity is more likely to exist. The literature on this subject is plentiful and, for the purposes of this article, we need not concern ourselves with this topic.[3]

Although in several decisions which preceded Lau federal courts sustained the soundness and appropriateness of bilingual bicultural education, and the right of children of limited English language skills to such programs (cf. United States v. State of Texas (San Felipe del Rio), Serna v. Portales),[4] it was not until Lau that the issue received nationwide publicity when, in a unanimous decision delivered by Justice Douglas, the United States Supreme Court found that failure by the San Francisco Unified School District to address in a meaningful way the needs of a large group of children of limited English-speaking ability amounted to a violation of their civil rights under Title VI of the Civil Rights Act of 1964. Although it was not clear, it appeared that the Lau decision recognized (or applied) only the rights of groups of students as opposed to rights of individuals. However, the Equal Educational Opportunity Act of 1974 went a step further in prohibiting the denial of equal educational opportunity to individuals in Section 1703, which states in part:

> No state shall deny equal educational opportunity to an individual on account of his or her race, color, sex or national origin by --
>
> (f) the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation in its instructional programs.[5]

The outcome of the possible conflict between group rights vs. (individual rights is still undecided and judicial testing may be required to further define and delimit the scope of existing legal precedents and federal (and, where applicable, state) legislation.[6]

Spurred on by what are perceived to be significant victories, Hispanic and other language minorities throughout the United States have turned to federal courts or federal agencies (such as the Office for Civil Rights) to seek relief for unmet needs. Quite often, their demands are based on the group's preference for programs which go beyond the remedies prescribed by law or regulation, which are mainly compensatory and transitional in nature. In an age of ethnic consciousness for most ethnic/racial minority groups in the U.S., parents are increasingly demanding that the educational system change from its traditional assimilationist, stripping-away of ethnicity and language through a monocultural/monolingual mold to a new pluralistic, multilingual/multicultural model involving group pride, respect and adaptation in diverse ways to values and behaviors of the dominent society. This demand translates into an advocacy for B/B programs which, although aimed at students with limited proficiency in English language competencies in all areas of speaking, reading, writing and comprehension, necessary to implement these programs, which place emphasis on inclusion of ethnic community communication skills in a language other than English and the pupil's home cultural and historical traditions.

The significant growth of the Hispanic community in the United States over the past decade and a half has resulted in most major urban areas having concentrations of Hispanos (Mexican Americans, Puerto Ricans, Cubans, persons from the Caribbean, Central and South America, as applicable, depending on the region).[7] Immigration to the United States accounts in part for this growth but although a portion of Hispanos in urban areas are new arrivals, most are U.S. citizens who have migrated north and west from the Southwest, especially Texas, and Puerto Rico. In some midwestern cities, Hispanic communities have existed for several decades. Within these urban centers, due to their low socio-economic level, Hispanos tend to be concentrated in central cities, where, together with Blacks (and, in some cities, other minorities Asian Americans, Native Americans, etc.) they make up in some cases a majority of the population and in most cases a significant percentage of the minority school age population. The movement of Whites from central cities to the suburbs ("White flight") also accounts for the sudden increase of minority students in major urban school systems. Segregated housing patterns, together with past discriminatory policies by school boards with little or no minority representations, have resulted in segregated schools where minority students of various backgrounds are deprived of educational opportunities. It is in this context that litigation to desegregate schools enters the picture, and it is here that the dual thrusts (desegregation and bilingual bicultural education) come in contact and possible conflict. Parenthetically, it must be recognized that voluntary desegregation and voluntary bilingual education has taken place in several cities. The success of these ventures is dependent primarily on these factors: size of the city, percent of minority population and the quality of community leadership.

A cursory review of the recent litigation to desegregate schools reveals a consistent pattern: usually Black plaintiffs bring suit against school districts and, after many years of effort and expenditure of money a judgment is entered in favor of the plaintiffs and, based on district-wide population data, desegregation is ordered along Black/White lines. Ratios of Black students and staff are established, and guidelines for phased implementation are developed as part of a comprehensive plan prepared by the plaintiffs or the district, subject to final approval by the court. Much of desegregation planning involves the movement of students for the purpose of achieving "racially balanced" schools which includes various amounts of busing and is usually done within the context of a court-ordered remedy addressed to the injuries sustained by the plaintiffs in the action.

In school districts with concentrations of Hispanos and other minorities, planning is usually done in the absence of any input from the Hispanic community, although it is clear that Hispanic pupils are affected by being transferred out of neighborhood schools and by other programmatic changes, especially with regard to staff. In order to protect the interests of Hispanic students, which are often tied to the viability of existing bilingual bicultural programs or programs to be created at schools where Hispanic children are transferred, Hispanic groups, often assisted by the Mexican Americal Legal Defense and Education Fund (MALDEF), the Puerto Rican Legal Defense and Education Fund (PRLDEF) and others, have intervened in a number of cases. The upshot of these interventions will be discussed at some length later on in this paper.

Suffice it to say that these interventions have succeeded in obtaining recognition by courts, school districts and Black plaintiffs of the unique educational needs of Hispanos and other cultural and linguistic minorities and programs they advocate to meet their needs.

The fact that Blacks have led the legal struggle for desegregation and that only after a case is won do Hispanos take a manifest interest in it, has caused some advocates of desegregation, both Black and White, to conclude rather hastily that Hispanos are opposed to school desegregation and integration. Viewed against the background of the struggle of Blacks for equality in American society, it is understandable that Hispanos are looked at as relative newcomers to this struggle.

It should be noted, however, that although this may be the case in northern cities, Chicanos in the Southwest and California have long suffered the effects of segregation and discrimination. Today segregation appears to be increasing for Hispanos.[8] Placement of Hispanic children in disproportionate numbers in classes for retarded children is a painful example of another type of segregation.

To complicate matters further, language and culture are injected into the debate, which previously had focused on strict racial White vs. Black lines. Coupled with this are different perceptions of race and color, derived from varied cultural and historical experiences, which tend to give non-Black minorities a distinct perspective on the problem. It is not surprising, therefore, to have Hispanos, as well as American Indians, Asian Americans and others, view desegregation of schools in terms of racial balance as primarily or even exclusively a Black/White issue.

Although in theory desegregation may be beneficial in the long run to society as a whole, it is not seen by many Hispanos as an immediate priority for their children and their community.[9] It may well be that the vision of these Hispanos[10] as to what their place and role in American society -- a vision which is based on their values and their experiences in this society and on ideological reference points which shy away from assimilation and lead toward cultural socio-economic pluralism -- differs fundamentally from that of a majority of the Black community.[11] The essential difference between these groups appears to be that while the Black struggle historically has centered around the integration of an involuntarily excluded and alienated segment of the population into the mainstream of social, cultural, economic and political life, the struggle of Hispanos and other culturally and linguistically (and racially different, whether in fact or merely perceived as such by the dominant society) groups has been one primarily of adaptation to social and cultural patterns, with some degree of participation in the economic and political spheres. This static description does not accurately portray the complexity of these processes which are directly influenced by societal discrimination and attitudes of the majority toward the various minority groups.

From the White perspective, one of the reasons why bilingual education and desegregation are seen as opposed is the tendency to describe all inter-group relations in Black/White terms. This perspective has led Whites to feel that if they could understand Blacks, they would understand other minority groups since Blacks were the most prominent minority group and the most clearly discriminated against.

Progress towards the equal treatment of Blacks is seen as progress for all groups. The final resolution of these divergent perspectives still remains to be worked out in the dynamics of the various racial and ethnic groups competing in American society.

Problems of Implementing Bilingual Bicultural programs in Desegregating Schools Systems

One of the most important issues, the resolution of which will have great impact on the future of bilingual bicultural programming in a desegregated setting, is the issue of student and staff ratios. Student and staff desegregation is frequently measured by how well individual schools or in some instances zones reflect proportionately the average majority/minority group populations. In fashioning remedies, courts have at times assigned ratios which must be met by planners if they are to satisfy the court's mandate. In districts where Hispanos make up a small minority of pupils and which offer bilingual bicultural education for a portion of these students, a rigid application of court-assigned ratios can result in the destruction of these programs.[20] Pedagogical considerations require that there be a minimal, critical mass of students and staff present to insure the viability of a program and some courts have accepted this reasoning. In the Boston case, for example, bilingual education needs were recognized in the desegregation plan ordered by Judge Garrity, and some latitude was allowed on specific ratios of Hispanic students per school in order to satisfy a state law mandating bilingual education and because of the designation of some schools as citywide programs.[21]

Teacher ratios is also a concern, given the need for an adequate number of instructors, and exceptions have been made also in this regard, but conditions and results vary greatly from city to city. Most interventions include direct references to this important aspect of any plan, although the prospects are highly dependent on teacher unions and the strategies utilized by them to look after the interests of their membership. The desegregation of school staffs, including administration, was long overdue, but the effects of staff desegregation are also complex. For example, Black teachers and administrators have lost their jobs over desegregation plans that involved changing community perceptions of previously all Black schools by placing White administrators and teachers in such schools. A similar situation could occur with regard to Hispanos.

The use of ratios has also stirred renewed controversy since in some cities it has become impossible to meet court-established ratios due to the increasing numbers of minority students. Indeed, in certain cities, such as Houston, courts consider schools legally integrated when its student body is less than 90% of one race or a combination of Black and Hispanic students.[22] A recent decision of the Supreme Court of California has raised doubts on the ratios to determine segregation in particular schools: "Moreover, in determing whether a particular school is "segregated" for constitutional purposes, we do not believe set racial or ethnic percentages can be established, either in absolute terms or in terms of the racial composition of a particular district's student population."[23]

Although the issue pertains to the California state constitution, it may be an indication of possible future trends brought about by what might be termed a reductio ad absurdum of court-assigned ratios.

There are, to be sure, other specific issues which cannot be examined here for lack of space but which also impact significantly on the future development of bilingual education in the United States. These include classroom (vs. school) segregation.[24] ability groupings, (Bilingual education appears to fall under the category of bona fide groupings, as determined by federal regulations in force),[25] and costs.[26]

If entire schools devoted to bilingual bicultural education are not permitted by particular judges on the grounds that such schools will not fit the local definition of a desegrated school, this must not be allowed as an excuse by the local district to ignore the needs of linguistic minority children. It would be unfortunate to dismantle such programs since a concentration of resources, both in terms of staff and materials, is beneficial to the implementation any new curricular change in education, and this is true for bilingual education as well. Dispersing students enrolled in such schools and not providing them with similar services in desegregated schools will place an undue burden on these children, is educationally unsound and indicates that the desegregation plan is not appropriate for the multi-ethnic/multi-lingual population in the district. Expansion of options for bilingual programming in other schools is often necessary. Some districts have experimented with pairing schools by grade levels, others by instituting half-day models which involve some transportation of students or teachers, still others by establishing pull-out type programs involving some tutoring and minimal language instruction. There are problems inherent in these alternative models, such as lack of sequencing instruction from grade level to grade level, the isolation of the few bilingual teachers in these programs and the increased demands on these teachers to individualize their teaching related to heterogenous groups of students. Additional supportive services, such as in-service training for all staff, are needed.

Voluntary ability grouping is likely to be needed in implementing bilingual programming in these contexts. This should not be seen in the same light as imposed segregation, such as tracking, which implies a dead-end situation limiting students' aspirations. Such voluntary grouping should be seen instead as part of the current trend in education sometimes referred to as "continuous progress," which involves individualization of instruction.

In some cases, educational plans for bilingual education that call for some dispersal of staff and students under desegregation may be more expensive. If this is the case, such costs cannot be an excuse used to prevent implementation and additional monies will have to be made available for bilingual educational implementation within the context of desegregation. Local funding is not always a viable alternative, since these students often reside in the poorest districts. While it is understandable that these districts are feeling great pain in having to implement both desegregation and bilingual education, resources must be found. Federal funds are available through the Emergency School Assistant Act (ESAA) as well as on-going funding from Title I and Title VII of the ESEA. The greatest expense will involve start-up costs for bilingual programs (staff, materials, training) but this will not be a continuing burden on the district's finances.

The debate over these issues is likely to continue through the end of this decade in courts, political arenas and educational circles. A more encompassing debate on the merits of bilingual education as an enrichment program, free of the trappings of remediation, can also be anticipated as advocates of bilingual bicultural education seek to establish a more permanent support base for these programs in the 1980's.

The debate which has arisen over bilingual education in the context of desegregation will continue and, as with other issues, a definite outcome will not emerge quickly.

Some Whites will reluctantly support desegregation of Blacks as an "American" remedy, since it focusses on individuals attempting to "melt" into the mainstream, but oppose bilingual education as a part of the remedy for equality since it stresses characteristics clearly associated with groups -- language and culture. However, the fact remains that people of color have not been treated as individuals in our society, but as members of groups. Color has been a critical characteristic denying such groups the possibility of "melting" into American Society. Creating schools which instill respect for groups may aid individual mobility.

Americans opposed to bilingual education within the context of desegregation raise the fears of political instability. Separatism will be the result of bilingual education, they claim. This adds unnecessary confusion. Educational programs which are based on an understanding and respect for what the children bring to school are not separatist in a political nation-state sense. Groups which desire recognition and respect for this uniqueness can be contributing members of a political entity. There is no inherent conflict between love of family, and love of country. Love of family does not mean a desire to reject the economic and political life of a nation. Only in certain societies, where groups do not share respect for each other, and economic and political decision-making does not include them, have political movements for separatism arisen that use language differences as a symbol for mobilization for political purposes. Recognizing language issues and taking them into account in desegregation planning is not for the purpose of political separatism but rather to insure educational opportunity in a multi-lingual, multi-ethnic, multi-racial society.

It is clear that cultural and linguistic minority groups are not progressing adequately through urban school systems. Programs to address the needs of these students must be included as part of desegregation planning. Solutions will vary depending on judicial precedents, educational justification based on research and political compromises arrived at through pressure and bargaining. It may well be that as Hispanos and other groups continue to increase their numbers at present rates, their presence will be more visible and carry more weight in the next quarter century. But, apart from whatever implications this growth in numbers may hold, a concrete contribution which bilingual education has already made to the on-going debate on school desegregation is that curriculum innovation and change is essential, not only for bilingual programs but for school systems as a whole. In many cases, bilingual programming has opened the way for curriculum reform which addresses the needs of a multi-cultural student body. In the final analysis, this may well end up being the most important and lasting contribution of bilingual bicultural education to integrated education in the U.S.

Footnotes

[1] For a concise yet comprehensive account of the growth of bilingual bicultural education in the United States, see the excellent article by Josué M. González, "Coming of Age in Bilingual/Bicultural Education: A Historical Perspective," Inequality in Education, Number 19 (February 1975), pp. 5-17).

[2] See Hannah N. Geffert, Robert J. Harper, II, Salvador Sarmiento, Daniel M. Schember, The Current Status of U.S. Bilingual Education Legislation, Center for Applied Linguistics (Papers in Applied Linguistics, Bilingual Education Series: 4), Arlington, VA, May 1975.

[3] Robert L. Crain et al., The Politics of School Desegretation, Chicago: Aldine Publishing Co., 1968.

Lino A. Graglia, Disaster by Decree: The Supreme Court Decisions on Race and the Schools, Ithaca, N.Y.: Cornell University Press, 1976

David J. Kirby, T. Robert Harris, Robert L. Crain, Christine H. Rossell, Political Strategies in Northern School Desegregation, Lexington, Mass.: Lexington Books (D.C. Heath and Co.), 1973.

Richard Kluger, Simple Justice: The History of Brown v. Board of Education and Black America's Struggle for Equality, New York: Knopp, 1976

George R. La Nove, Bruce L.R. Smith, The Politics of School Desegregation, Lexington, Mass.: Lexington Books (D.C. Heath and Co.), 1973

Nancy St. John, School Desegregation: Outcomes for Children, New York: John Wiley and Sons, 1975

Meyer Weinberg, School Integration: A Comprehensive Classified Bibliography of 3,100 References, Chicago: Integrated Education Associates, 1967.

[4] United States v. State of Texas, 342 F. Supp. 24 (E.D. Texas 1971), aff'd per curiam, 446 F. 2d. 518 (5th circuit 1972) at 27-38.

[5] 20 U.S.C. Section 1703.

6

The Supreme Court did not find in Lau that the plaintiff's constitutional rights had been violated. Rather, it restricted its findings to the Civil Rights Act and decreed that measures must be undertaken to correct inequities attributable to language differences. Lau affirmed the soundness of previous office for Civil Rights regulations, specifically the May 25, 1970 Memorandum and Supported OCR's authority to issue and enforce such directives.

Since the Lau case was a class action suit, the rights of the approximately 1,800 children to special remedies appropriate to their condition of inequality were recognized. But the caveat contained in Judge Blackmun's concurring opinion, cast a shadow of doubt on the applicability of Lau to individual rights:

> I merely wish to make plain that when, in another case, we are concerned with a few youngsters, or with just a single child who speaks only German or Polish or Spanish or any language other than English, I would not regard today's decision, or the separate concurrence, as conclusive upon the issue whether the statute and the guideline require the funded school district to provide special instruction. For me numbers are at the heart of this case and my concurrence is to be understood accordingly.

Following the Lau decision the San Francisco Unified School District was ordered to present a plan to the district court on how to provide services to children of limited English language skills. (LELS) The Center for Applied Linguistics was retained by the district to assist in the planning of the plan. In October, 1976 a consent decree was signed, wherein the district agrees to implement bilingual education programs for LELS children. (The Linguistic Reporter, Volume 19, December 1976, p. 1)

7

Persons of Spanish Origin in the United States: March 1975 (Advance Report) - Population Characteristics, Current population Reports, Series p-20, No. 283. Issued August 1975 by the Bureau of the Census, U.S. Department of Commerce, Washington, D.C. This report states that in March 1975 there were an estimated 11,202,000 persons of Spanish origin, which made up 5.3% of the total U.S. population. The median age for this segment of the population was 20.7 as compared to 28.6 for the entire U.S. population.

8
During the 1974-75 school year, Hispanic children were more likely than Blacks to be attending predominantly minority schools. Such segregation is stable or growing in every region. "Twelve Years Later: Most Black and Chicano Children Still Attending Segregated Schools," in Un Nuevo Día, Published by The Chicano Education Project - Lakewood, Colorado, Fall, 1976, Vol. 2, No. 3, pp 7,-14.

9
"L.A. Desegregation a Tall Order to Fill," The Milwaukee Journal, Sunday, January 16, 1977.

10
Hispanos are indeed a heterogeneous group, and are not to be looked at as monolithic. To be sure, there is a wide spectrum of ideology and opinion within Hispanic communities throughout the U.S. The same is applicable to Black communities, of course. The intent is to underscore what appears to be the representative opinion on this subject by the majority of these groups, as articulated by leading spokespersons.

11
The term "cultural-socio-economic pluralism" is taken from the essay by Antonia Pantoja and Barbara Blourock, "Cultural Pluralism Redefined," in Badges and Indicia of Slavery: Cultural Pluralism Redefined, Antonia Pantoja, Barbara Blourock and James Bowman, Editors, Study Commission on Undergraduate Education and the Education of Teachers, University of Nebraska, Lincoln, 1975, pp. 2-24.

20
Pomona, California is a good example of this (information obtained in a telephone conversation with Richard Hiller, Staff attorney for the Puerto Rican Legal Defense and Educational Fund, New York, NY.)

21
Exceptions to these variation limits shall be permitted where necessary to allow appropriate bilingual assignments or to allow students in any racial or ethnic group to be assigned to a particular school in groups of at least twenty. As a result, some schools may have no other minority students in attendance." (p. 73). Later on in the plan, an exception is made regarding bilingual instruction: "(b) The (Rafael) Hernandez school, which containes a citywide Spanish-English bilingual program, may enroll a student body up to 65% Hispanic. Non-Hispanic other minority will be eligible along with White and Black students, within the remaining 35% of school capacity." (pp. 75-76) Cf. Student Desegregation Plan, Morgan v. Kerrigan, C.A. No. 72-911-6, May 10, 1975 Another issue, which was of crucial importance, was decided earlier when the Court accepted the plaintiffs-intervenors request that the City defendants' method of characterizing them as Black or White Spanish surnamed be rejected and that Hispanos be treated instead as a distinct ethnic group for purposes of protecting their rights in any school desegregation plan. (Memorandum, Proposal, and Critique of Plaintiffs-Intervenors, Morgan (and El Comité de Padres Pro Defensa de la Educación Bilingue) v. Kerrigan, C.A. 72-911-G, February 3, 1975, p. 1).

22
Article in the New York Times, July 24, 1976.

23
Crawford v. Board of Education of the City of Los Angeles, C.A. 30485, 551 p. 2d. 28 at 43. Significant portions of this important d-cision are included for reference:

"...The Constitution does not require a school board to achieve a particular or identical "racial mix" or "racial balance" in each school; rather, the constitutional evil inheres in the existence of segregated schools ... Experience has taught that the task of integration is an extremely complex one which entails much more than the percentages of pupils of different races or ethnic groups to the same school."

(Segregated schools are defined as) "schools in which the minority students enrollment is so disproportionate or realistically to isolate minority students from other students and thus deprive minority students of an integrated educational experience."

"In addition to the racial and ethnic composition of a school's student body, other factors, such as the racial and ethnic composition of the staff, and the community and administration attitudes toward the school, must be taken into consideration." (emphasis added)

[24] José A. Cárdenas, "Bilingual Education, Segregation and A Third Alternative," Inequality in Education, Number 19 (February 1975), pp. 19-22, provides valuable specific suggestions on how instruction can be individualized in a bilingual classroom.

[25] Cf. 45 C.F.R. Section 185.43 (c) for the specific requirements imposed by the rules.

[26] See José A. Cárdenas, "Bilingual Education Cost Analysis," (a presentation to the CACTI (Lau Center) Multi-Cultural Education Materials Conference in Albuquerque, New Mexico on December 9, 10, 11, 1976)